The Reconstruction of
Legal Thought
In
ISLAM

Comparative Study of Islamic and the Western Systems of Law in the latter's Terminology with particular reference to the Islamic Laws Suspended by the British Rule in the Sub-Continent.

Dr. Riaz-ul-Hasan Gilani

Dedicated

to

My Mother Sayeda Noor Safiya

who taught me Arabic and Exegesis

of the Qur'an.

QUOTATION

"*Considered from the point of view of its logical structure, the system (Islamic Law) is one of rare perfection, and to this day it commands admiration of the student. Once the dogma of the Revelation to the Prophet (peace be upon him) is admitted as postulate, it is difficult to find a flaw in the long series of deductions. So unimpeachable do they appear from the point of view of Formal Logic and of the rules of Arabic Grammar. If the contents of that logical fabric are examined, some theories command not only admiration but surprise. Those Eastern thinkers of the ninth-century laid down, on the basis of their theology, the principles of Rights of man, in those very terms, comprehending the rights of individual liberty, and of inviolability of person and property ; described the supreme power in Islam, or Caliphate, as based on a contract, implying conditions of capacity and performance, subject to cancellation if the conditions under the contract were not fulfiled, elaborated a law of war of which the humane, chivalrous prescriptions would have put to the blush certain belligerents in the Great War; expounded a doctrine of toleration of non-Moslem creeds so liberal that our West had to wait a thousand years before seeing equivalent principles adopted. Such a height and scope of conceptions may well have sufficed to inspire silent submission in any minds not endowed with constructive genius to an equal degree, but events, moreover, occurred that seem to have exerted the influence of a crushing and decisive factor.*"

——*Leon-Ostrorog: THE ANGORA REFORM, pp.* 30-31.

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ERRATA

FOREWORD

By

SYED ABUL A'LA MAUDOODĪ

It must have been the first task, after the creation of Pakistan, to make preparations for the implementation of of Islamic law in this country. To this end, Islamic law should have been introduced into our law colleges as a regular subject without delay. But the task remained neglected for long and it was not before twenty-five years had gone by that the Punjab University introduced it as a compulsory subject into its law colleges. It may now be expected that other universities of the country, too, will do the same as it is one of the primary requirements in an Islamic state.

I am very glad to know that a brilliant, learned young lawyer, Sayyid Riaz-ul-Hasan, has been appointed lecturer in the Punjab University law college. He is not only well-versed in modern law and jurisprudence but is also fully conversant with Islamic law. His knowledge of the latter is not confined to translations ; he has direct access to the original sources of the *Shari'ah*.

I have given a close reading to the scholary work, *The Reconstruction of Legal Thought in Islam*, written by Sayyid Riaz-ul-Hasan as a text book of Islamic law. My impression after going through the book is that the author's knowledge of the subject is vast and his thinking sound. Comparing the Islamic legal system with the other systems of law, he has with very solid arguments established that the law given by God and His Prophet (PBUH) is in every respect superior to man-made law. The Orientalists who are reputed in the Western world for their erudition and who strike half-baked Muslim intellectuals with awe, have come in for such a powerfully reasoned criticism at his hands that the mask has been ripped apart from their

intellectual dishonesty. But the most creditable thing about the author is that his view of the Islamic ideology is entirely correct. He has conclusively shown that law to be valid must be derived from Divine Revelation. He has proved on the strength not of mere faith but of compelling logic and cogent reasoning that all law devised by man without the sanction and guidance of the Sovereign of the Universe is basically wrong and definitely void. If *The Reconstruction of Legal Thought in Islam* is included in the syllabi of all the country and if the teachers of the subject, too, are right-minded Muslims like the author of that book, there will come about, I hope, a remarkable revolution in our legal thought.

5-A Zaildar Park
Ichhra, Lahore
Pakistan.
May 23, 1975

ABUL A'LA MAUDÓODI

PREFACE TO THE REVISED AND ENLARGED EDITION

In 1972 the Punjab University decided to introduce in its Law colleges those Islamic laws which were suspended by the British Rule in India and which are now required to be implemented in Pakistan. The author was asked to draft the syllabus (appendix I) which was approved by the University and, accordingly, the paper named 'Islamic Law and Jurisprudence Part II, was made compulsory for the LL.B. classes. The author was appointed part-time lecturer in the Punjab University Law College to teach this subject.

While drafting the syllabus and writing the present book as the text book, the author had in the mind what 'Allāmā Iqbāl has pointed out to be the need of the time:

> "The requirement is that it should be practically demonstrated that for the guidance of the Mankind, all the necessary law, are contained in the Qur'ān. The laws prevalent among the other nations should be criticised from the Qur'ānic view point and it should be proved that those are defective. It is my belief that the person who criticizes the Modern Jurisprudence from the Qur'ānic view point and establishes the eternity of the Qur'ānic Laws, shall be the reformer of Islam and the greatest servant of the Mankind."[1]

The name of the book has been borrowed from 'Allamā Iqbal which also suggests that the utmost efforts have been put to realise his above mentioned wish.

The Scheme of the book is that first of all the principles of Islamic law and Jurisprudence as contained in the Qur'ān, the *Sunnah* and in the works of the authentic doctors of Islamic law, are explained in the vernacular of the Anglo-American Legal System. Then the parallel concepts of the other impor-

1. *Iqbal Namā*, v. 1, p. 50.

tant legal systems are stated, compared and criticised; and thus, the superiority of the Islamic legal principles is established. The adverse remarks of the renowned Orientalists are quoted and refuted at every relevant juncture of the discussion. While critically appreciating an Orientalist, support has also been sought, if available, from the other Orientalists.

The first edition was brought out in a hurried manner so that it could be available to the students as soon as passible. After that, the author has been all along conducting further reseach for upto the mark improvement of the book. A complete chapter, *Guide for the Lawyers* has been added for the Advocates and the Judges. This would enable them to find out where the law is; the famous jurists, their works and styles have been introduced therein.

Maulānā Syed Abu al-A'lā Maudoodī, was very kind to take keen interest in the book. He spent almost one month in going through the First Edition of the book from cover to cover. He enriched the margines of the book with his scholarly suggestions for further research. The author is grateful to his eminence also for writing the Foreword and taking personal interest in getting the Revised Edition printed under the auspices of 'Idārā Tarjumān al-Qur'ān'

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PREFACE TO THE FIRST EDITION

With the advent of British Rule, *Shari'ah,* which was the rule for decision in all cases was restricted to the Personal Law and could be applied only where the parties are Muslims. The Constitution of the Islamic Republic of Pakistan now undertakes to establish an order—

> "Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed;
>
> Wherein Muslims shall be enabled to order their lives in their individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'ān and the *Sunnah*; and
>
> All existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Holy Qur'ān and the *Sunnah.*"

This Book is being published for providing guidance on this all important subject to all who are concerned with law and no apology is needed as it is the first of its kind in this country.

The author's mother, an erudite scholar of *Tafsīr.* taught him Arabic and kindled the spark of acquisition of knowledge of Islam in its various manifestations, thus laying the foundation for this Book. While studying at Government College, Lahore, he joined 'Jāmi'ā Ashrafiyah' Lahore where he took his education in *Hadīth* (the traditions of the Prophet) till he obtained his Master's Degree in Science from the Punjab University.

The Holy Qur'ān is the main reservoir of every aspect of the Islamic Law. While discussing the Legal Thought of Islam, the relevant verses of the Qur'ān have been quoted. Explanatory support has been sought from the conduct (*Sunnah*) of the Prophet (peace be upon him) and the views of the great doctors of Islamic Law. As far as possible, the language of the Western Legal Systems has been used to enable the lawyers, educated therein, to understand the book easily. Inadvertent or advertent

mistakes of the Orientalists have been pointed out. The parallel concepts of the Western Legal Systems have been compared and criticised.

The Punjab University has introduced Islamic Laws in its Law Colleges which now form the snbject of this book. The paper has been named 'Islamic Law and Jurisprudence Part II' and made compulsory for the LL.B. Classes. The author teaches this subject at the Punjab University Law College and has also drawn upon the material for his Lectures in writing this Book. The requirements of the students have all along been kept in view and appendices have been added to help them grasp the somewhat difficult though important Chapters VI and XI.

The author is grateful to Mr. Izharul Haq Advocate Supreme Court of Pakistan for his valuable suggestions; to Malik Mohammad Saeed of the P.L.D. for the untiring personal interest that he took in the printing of the Book and most of all to Professor Imtiaz Ali Pro-Vice Chancellor of the Punjab University for his ungrudging guidance and encouragement.

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Introduction

I

If the challenge is between a civilization and a civilization—pure and simple, no civilization could stand before Islam. The disbelief is there in the world only because either the Muslims did not present and demonstrate Islam properly or the pure civilizational war took the shape of territorial, racial, linguistic and other pre-Islamic (جاهلی) wars.

The Legal System of Islam is the only unrepealed and uncorrupted Divine System. It is the *Golden Mean* (وسطا) of all the legal thoughts, and the meritorious achievements of the Western legal systems have sprung out of it. *Magna Carta* which was given by King John in 1215 was in fact the result of a compromise between the king and the Barons, and was drafted primarily for the benefit of the latter. It has no mention of the rights of a common man. The jurists of the 17th century tried to read into it *Trial by Jury, Right of Habeas Corpus* and *control over the power of taxation.* The *Declaration of the Rights of Man* was the most important achievement of the French Revolution of 1789. The common man's Right of Freedom, Equality before Law, Right to hold Property etc. were introduced into it.

This shows that the concept of the common man's right is hardly two or three centuries old in the Western society. But

all these rights are given by the Holy Qur'ān, and were summarised by the Holy Prophet (peace be upon him) in his famous address of *Hajjāt al-Wadā'* which has enlightened the Mankind for fourteen centuries.

It is commonly thought that the *Declaration of Human Rights* of the French Revolution was the result of the social philosophy of the eighteenth century, particularly the social contract theory. But this is not the whole truth. Almost all the knowledge, particularly that of Science and Law has reached the European countries through Spain. Cordova (قرطبہ) and Granada (غرناطہ) were the great seats of learning. Students from all over Europe used to study Jurisprudence, Philosophy and Science in these Muslim Universities and return with the illuminated and illuminating minds.

> "Scholars from the West visited Spain to learn Philosophy, Mathematics, Astronomy and Medicine. The oldest European Universities owe an enormous debt to those scholars who returned from Spain bringing with them the knowledge they had gained at the Arab Universities of that country."[1]

Mr. 'Abd-Allah in his book *Al-Muqaranat al-Tashrī'iyyah* published in Egypt in four volumes, has compared the modern French Law in detail with the provisions of Muwaṭṭa' (مؤطا) the famous baok of Traditions complied by the great jurist Mālik. He has brought out striking similarities in most of the provisions and has successfully demonstrated that the modern Law of France is based on Mālik's Muwaṭṭa'. The reason is that the Muslim Spain followed the Mālikite school of law and the fore-runners of the modern French Jurists learnt Jurisprudence and Law in Spain. Moreover, Napoleon during his stay in Egypt went through the Muwaṭṭa' with a keen and careful eye; and under its influence got the *Code Napoleon* compiled, which is the foundation of the Modern French Law.

Grotius wrote an elementary book on International Law

1. A. Guillaume, "Islam" p. 85

in the 17th century, the first book on this subject in Europe. In the Islamic world a thorough and comprehensive book on the Public Internation Law was written by the famous pupil of 'Abū Hanifā, Mohammad bin Hasan Shaibānī in the 8th century. A commentary was written on this book by *Shams al-Ā'immā* Sarakhsī in the 11th Century. The book along with the commentary (شرح السير الكبير) is in four volumes and is more comprehensive and scientific in treatment than Oppenheim's *Internation Law.* Ibn Qayyim's *Ahkam Ahlizzimmā* (احكام أهل الذمة) is a book in two volumes on the Conflict of Laws and deals with the concepts and situations still unknown to the Western world.

The Western society has made remarkable achievement in the field of Physical Sciences and Technology. This does not mean that they have superior Legal Thought, as well. If a person enjoys high standard of living, his ideas are not necessarily noblest in the society; although he might know well the techniques to maintain his status and wealth. A person, on the other hand, with meagre material resources may have the wealth of a rich thought. There is no occasion to believe, even for a moment, that the Islamic thought should be apologetic before the Western thought in any respect.

The Islamic Legal Thought being Divinely revealed is already well balanced on the position of the Golden Mean (أمة وسطا) Nobody can be wiser than the Omniscient Almighty. It requires only up to date and proper presentation. Any change or stretch under the influence of the Western principles would disturb its balance. A change in the Islamic thought amounts to distortion and is termed as Apostasy (الردة). The Western thought, however, should change because it is passing through the evolutionary stages attempting to reach the Golden Mean.

Modernism is the term usually used by the Orientalists to indicate the tendencies which call for changes in the various institutions of Islam under the impact of the Western thought. This term was coined by Pope Pius X ironically. He was deadly against making any subjective thinking instead of the sanc-

tion of the church, as the standard of right or wrong in th sphere of Religion and Ethics. When the Orientalists emplo this word in the context of Islam, they do so in the same sens as that of the Roman Catholic Church.

> "The 'independent reasoning' that they claim goes far beyond any that was practised in the formative period of Muhammadan Law. They are apt to use arbitrary and forced interpretations of the *Kor'ān* and triditions whenever it suits their purpose. Their edeals and their arguments come from the West, but they do not wish to reject the sacred law openly as Turkey has done.[1]

II

The two most remarkable achievements of the Western Society are Democracy and Technological advancement. Technological advancement in the West started with the Industrial Revolution,[2] the term used for the period when the mechanical power started replacing the human labour. An Industrial Revolution can take place in a society where large production of commodities is in demand. The pre-requisite of more production is more consumption. The increased consumption of goods and the rise in the standard of living started in Europe when the mundane attitude towards life and the concept of Equality became popular among the people of Europe.

The phenomenon of development in Europe has been scientifically proved by the famous German Sociologist Max Weber in his book. *The Protestant Ethics and the Spirit of Capitalism.*[3] His main thesis is that the capitalistic development in Europe was preceded by the mental revolution caused by

1. Schacht, J., "The Law, Unity and variety in Muslim civilization", p. 83.

2. The term Industrial Revolution is often attributed to Arnold Toynbee. It has, however, been used by a French writer Blanqui, as earty as 1837,and later by Jevons, Engels and Marx.

3. Translated into English by the American Sociologist Talcott Parsons.

Martin Luther—a great advocate of adopting a worldly and positive attitude towards life. It is a historical fact that this Positive Attitude and the concept of Equality were borrowed by the Europeans from the Muslims. Martin Luther himself was a keen student of Islamic History and could read Arabic.

In Europe the Christian dogmatic theology and priestly authoritarianism stood against free thought and scientific inquiry for centuries. St. Augustine (354-430 A. D.) wrote *City of God* and visualized therein the separation of church and state with the condition that the state could only be part of the City of God by being subordinate to the church in all religious matters. The church transformed into a strong organization and assumed a dictatorial position. St. Thomas Aquinas (1225-1274 A. D.) introduced the Greek Philosophic Thought into Christianity. He affirmed that in order to substantiate the truthfulness of the Catholic Faith one must have recourse to reason. But while the church was prepared to use rationalistic methods to substantiate its own doctrines, it was strongly opposed to the expression of rationalistic views by others. With this power and prejudice of the church, the innovating scientific spirit of man was thoroughly crushed. In the words of R. H. Tawney;

> "Their obstinate refusal to revise old formula in the light of new facts exposed them helpless to a counter-attack, in which the whole fabric of their philosophy, truth and fantasy alike, was overwhelmed together. They despised knowledge and knowledge desrtoyed them."[1]

The intellectuals like Karl Marx and Bertrand Russell were, perhaps, obliged to abandon Christianity because of its dogmatic, anti-rational, and anti-scientific outlook. The Western thought represents a vigorous reaction to the mythologising of Christianity in the Greek mould. The idea of God as presented by Christian theology—God begething a son and

1. Tawney, R. H., *Religion and the Rise of capitalism*, p. 231.

arranging the son's crucification in order to atone man's original sin—placed a lot of strain on reason. Once belief in such a god is shaken it takes down with it not only the idea of God itself but also the whole fabric of the religion. Another field in which Christian thought proved vulnerable was its stress to the other worldliness. In the absence of any legal thought to control this world, the reaction came in the form of 'virtue in self-interest' culminating in concepts of racial superiority and naked power.

The Qur'ān, on the other hand, addressed itself to the rational mind. It referred to the order in the Universe, the principels and certitudes within it. In urging man to observe the perpetual change in the minds, the alteration of the day and the night and the planets swimming through the infinite space the Qur'ān invites man to accept the existence of the Creator and leads them to the dynamics of progressive creation.

The Qur'ānic message opened up to its followers the method of observation and experiment. In quest of the research for knowledge, they assimilated Greek thought and moved on from its essentially deductive principles to the inductive method and on to scientific advance. Professor Hitti says:

> "Islam thus led Christian Europe toward the modern point of view. In the scientific field, the Islamic spirit was anticlassical. In the study of chemistry and the physical sciences the reliance came to be on objective epexriment, inquiry, and research—the scientific method—as against the hazy speculation of the Greek."[1]

Thus, Islam enabled Europe to get rid of priestly authoritarinism, and by diffusing into it the concepts of Rights of Man and the organizational framework of society it paved the way to the constitutional and democratic tradition. The Western and the Islamic civilization have a common cultural base and an understanding among them would lead to a better

1. Hitti, P. K., *History of the Arabs*, p. 147.

world order. Gibb has very rightly suggested:

> "If ever the position of the great societies of the East and the West is to be replaced by co-operation, the mediation of Islam is an indispensable condition. In its hands lies very largely the solution to the problem with which Europe is faced in its relations with the East."[1]

The West has got superior technology and Islam has got superior Spiritual and legal Thought. A give and take between the two is the requirement of the modern world. The forces of Nature must be harnessed not to the unrighteous desire of domination, but to the mobler interest of an upward movement of spiritual life. The scientific advance of the West in the capitalist as well as the communist blocs, needs the controlling hand of Islam.

III

The Orientalists (the Western scholars who undertake the study of the Oriental subjects) write on Islam usually from a particular view point. Their knowledge is also superficial and lacks depth. There are these categories of the Orientalist:

(*a*) *The Christians*—They write with the Christian missionary prejudice against Islam. After being defeated in the the Crusades, they decided to open the front against Islam instead of the the Muslims. Their object is to distort and criticise the heritage and provisions of Islam so that a muslim's belief is confused and his psychological affiliation with Islam is weakened. It has been pointed out by Southern in *Western Views of Islam*;

"The existence of Islam was the most far-reaching problem in Medieval Ages and the existence of Islam made the West profoundly uneasy."

Sir Willium Muir expressed the real Christian senti-

1. Gibb; H. A. R., 'Whither Islam', p. 379.

ment when he said in *The Mohammadan Controversy*: "Mohammadanism is perhaps the only undisguised and formidable enemy of christinity."

There are, however, some scholars who have, in spite of their surrorrndings, made serious efforts at an unbiased understanding of Islam; and some of them have acknowledged the truth and sincersiry of the Holy Prophet (peace be upon him). But as Daniel says in *Islam, Europe, and Empire;* "These Christians are the exceptions." The general attitude remains the same; Muir, Maracci, Spengler, H. G. Wells, Buhl, Margoliouth, Cactane, Tor Andres etc. are the writers of the present age who have indulged in vilification of Islam similarly to that had become the general practice of the Middle Ages.

(*b*) *The Jews.*—The Jews are trying hard for their revival. They find that the Muslims are not only their only rivals in this field but also they are far ahead of them in every respect. So, to retard the pace of the Muslims, they decided to launch their intellectual campaign against Islam. Joseph Schacht represents this category.

(*c*) *The Seculars.*—This category comprises of the scholars like the British historian Arnold Toynbee. They are convinced of the downfall of the Western culture. The collective values are fading away, and the Individualistic attitudes are emerging very speedily. The Western Society is now expected to turn into a cultureless aggregate of individuals. Oswald Spengler, Bertrand Russel, Ralph Linton, etc. have written a lot to assert this prediction. Pitrim A. Sorokin has written *The Crisis of Our Age* to refute this view. Just as Milton wrote *Paradise Lost* and *Paradise Regained* to depict Adam as a hero but every time he found that Satan had emerged as hero, instead of Adam. Simi-

larly Sorokin started this book to undo the hypothesis of the *Dark Future* of the Western Civilization, but has happened to have supported the very thesis.

Strong collective action depends on the presence of strong social values and beliefs. In case the Western society is transformed into the aggregate of individuals, any minority from within, cultured with strong values, may dominate them. They will not be able to react collectively and repel it. On the other hand they will themselves get absorbed into that. These scholars fore-see this state of affairs and want to avoid the possibility of the creation of any such minority from within the Western Society. Islam is a strong living culture and possesses all the potentials of creating such a community. The object of their criticism on Islam is to avoid its attraction and impact on the minds of the Western people for some time. They hope that the Western Society itself may create some collective values in the meantime.

The Orientalists of the three categories distort and misinterpret the salient features of Islam. Their attempt is centred round establishing the following points for the purpose of sabotaging the originality, integrity and universality of Islam:

(*a*) The Muslims took their law from the Romans and the Jews ;

(*b*) The philosophy and metaphysics was taken by them from the Greeks;

(*c*) The social system and literature was inherited from the pagan Arabs ;

(*d*) The ethical principles were adopted from the Christianity ;

(*e*) Thought and ideas become obsolete with the passage of time. Islam is Mediaeval and is not practicable in the modern society.

By establishing the above mentioned points, the Orientalists

aim at withdrawing the Spirit of Revelation from the *Shari'ah* and also tend to render it incapable of enjoying a conrolling and living force. What they mean is that *Shari'ah* must cease to be a religious and revealed law and instead of controlling society, which is its chief purpose, it should itself he controlled by society and serve its interests.

The methodology of the Orientalists is entirely subjective and unscientific. To support their self-assumed thesis, they collect material without discriminating between authentic and unauthentic, and without reference to the context. Sometimes they omit the most important portion, and it also happens that they distort the facts. In this manner they establish their self assumed premises.

The enemies of Islam have made three-dimensional achievements against the Muslims ; the first one has been made by the Orientalists whereas the other two by the colonial powers.

(*i*) *Demoralisation.* During the days of their rise, the morale of the Muslims was at its peak. The relationship of the Muslims and Islam was the strongest. In other words they were true to their faith (ایمان) and used to reflect its true picture in their deeds. The temptation of status (جاہ) and property (مال) would not shake them. They were not afraid of death and used to shun the luxurious way of life.

Now, they are highly demoralised. They are very weak muslims. A small temptation of status and property can make them violate their belief. Their minds have been corruped. They love luxuries and hate death. They lack the qualities of administering the rule of Divine Law. They seek refuge of unauthentic precedents and misinterpreted texts to rationalize their perversions. The distortions are termed by them as 'modernism' (تجدد) They shirk believing in the validity of the Word of God in its revealed form.

(*ii*) *Disorganisation.* The corrupt monarchies of the Muslim societies and the Western colonial powers created vested interest and privileged class among the Muslims and through their instrumantality controlled the law and order situation favourable to them. This privileged class superimposed on the Muslims is neither sincere to Islam nor to the Muslims; but they are only interested in their vested interests. They command the control of the society but do not reflect the aspirations of the Muslims. This is an extreme kind of disorganization that a job is entrusted to the persons who are neither capable for nor sincere to that.

(*iii*) *Disarmament.* Morally weak and highly disorganised Muslim society is disarmed as well. Sultān Tīppū's armaments were superior to those of the British. But now the Muslims can't produce their own armaments, what to talk of comparison in superiority !

IV

Those Muslim scholars who have no access to the original Arabic texts of Islam and have not done systematic learning in the Islamic studies, unconsciously, fall prey to the objects of the Orientalists. Sir Abdal-Rahim has compiled in English a book on Islamic Jurisprudence called *Muhammadan Jurisprudence.* The very title of the book is averse to the Muslim mind as it connotes as if the Muslims worship Muhammad (peace be upon him). From the record of the Silk Movement led by Sheikh al-Hind Mahmūd al-Hasan, it transpires that this book was written with a particular motive. The British Government in India was facing a very serious situation on behalf of the Indian Muslims. The problem was that the renowned scholars had declared *fatwas* that their religion did not allow them to live as loyal citizens of the Government of alien disbelievers. They should either overthrow them or migrate from India. This book was

written to establish that India was *dar al-Islam* and the Muslims could live as loyal citizens of the British Government.[1] He got some portions of *Tauzīh* and *Talwīh* translated into English, and made some additions from his own in the begining and in the end wherein he, under the influence of the Orientalists, has committed blunders. For instance, he holds that Islam was superimposed on the pre-Islamic customs of Arabia in the form of certain amendments. From this it follows that Islam was not a revolution and the entire *Shari'ah* is not revealed. Similarly Abd al-Rahim states that Abū Hanifā relied on only eighteen traditions, although the muslim scholars manifestly declare that this is a false and baseless allegation on Abū Hanifā, for the simple reason that not a single chapter of Islamic law could be compiled with the help of eighteen traditions.

Subhī Mahmassānī knows Arabic but he is not well schooled in the Islamic studies. He is unable to sift grain from the chaff. In his *The Philosophy of Islamic Jurisprudence* he has attributed Modernism to the First Caliphs of Islam and has tried to substantiate that with the help of unauthentic precedents. He has also placed much reliance on Najm al-Din Tufi while discusing the doctrine of Public Good, and has deviated from the normal path. Tūfī has not been recognised as a reliable and anthentic scholar by the majority of the Muslim Jurists.

V

The present book has primarily been written for the students of law, except the chapter; *Islamic Law and Social Change*; which is an original research work addressed to the intellect of the West. Its sum and substance, however, must be known to the law students. They must understand how law becomes out of date and why the Islamic Law is never out-

1 *Tehrik Sheikh al-Hind* Ed. Muhammad Mian, P. 304.

dated. They must be in a position to assert and explain the univeral and eternal character of the Islamic Law in the Western language.

The author takes pride in propounding a few theories and sytematic expositions for the first time; particularly, the Theory of *Technicways* and the Theory of *Master and Servant* in the part of Jurisprudence, and the *Two Nation Theory* in the Chapter on *International Law.*

The book has been divided into two parts. Part one consists of the comparative study of the Islamic Jurisprudence and Roman Law. Part two comprises of the chapters on Constitutional Law, International Law, Law of Crimes, Law of Contracts and Torts, and the Principles of Evidence. The chapter on the comparative study of the Roman Law with the Islamic Law, has been included to undo the effect of the misconception spread by the Orientalists that the Islamic Law was borrowed from the Roman Law. The Family Laws have been purposely excluded for the reason that a lot of work has been done in this sphere.

The British Government in the Indo-Pak sub-continent kept countinuing the Family Laws but the Islamic Laws which are required for establishing and running a state were suspended. Legal system is part and parcel of a political institution. It is an unfortunate state of affairs that the legal system continues although the British Government has been got rid of. At least the Muslim Society ef the sub-continent must restore the suspended laws. The Constitution of Pakistan also emphasizes this requirement.

There is no justification of teaching the British Law of Torts in the Universities of Pakistan. No statute enforces it. It does not come under the personal laws. It comprises of the customs and traditions—the Common Law—inherited by the British from their ancestors; which cannot be the equity, justice and good conscience of the people of Pakistan. Their equity, justice and good conscience can only be the Islamic Law of

Torts (تعدی).

The Western International Law is similarly superfluous for us. The jurisdiction of the *International Court of Justice* is to decide the disputes according to the principles of International Law recognised by the civilized people of the World. The Islamic Law of Nations is also recognized by a bulk of the civilized people of the world, and a Muslim can ask the *International Court of Justice* to proceed accordingly. The terms of the Constitution like sovereignty, etc. have to be interpreted in the light of the constitutional principles laid down by the jurists. A Muslim has got every right to apply the constitutional principles of the *Qur'ān* and the *Sunnah*.

PART I

JURISPRUDENCE

1

Definitions

1. DEFINITION OF LAW

There is a great diversity among the Western Scholars about the definition of law. Every jurist has given a different definition. Some say that it is the order of the superior to the inferior, some hold that this comprises the customs and traditions recognised by the state, while others maintain that this is an outcome of the necessity and expression of the will of society. This difference is due to their different views regarding the basic concepts of law.

John Austin says, "Law is that rule of action which is made by a ruler for his subjects." He has real and objective view of law and ignores its ideal or just aspect. This may be true about the Statutory Law but does not cover the Personal Law and those spheres of law about which the Statutory and Personal Laws are silent.

According to Salmond, law has indispensable relation with Justice. He says, "Law may be defined as the body of principles recognised and applied by state in the administration of Justice." But there are laws which are unjust and express the ulterior motives of the ruling class. It does not cover the International Law, as well.

The Historical School of Germany headed by Savigny has propounded the Sociological concept of law. Enger Ehlrich is its modern exponent. According to them the law is the collective conscience of a society. Their main emphasis is on customs and traditions. They have, in fact, confused the source of law and the 'law' itself and have ignored the role of the modern state which introduces social change through law. There are customs and traditions which are considered to be undesirable and do not express the conscience of the society.

The main trouble with the Western Jurists is that they cannot have before them the complete picture of human life and nature. The exact comprehension of law can be done by the person who has before him the totality of human life and understands the human nature completely. In the words of Kant, 'perception without conception is blind and conception without perception is empty' Rūmī has given the example of five blind persons who conceived of an elephant to be exactly like that part of its body on which each of them could lay his hands. Sigmund Freud could explain the phenomenon of 'Oedipus Complex' as it exists in the patriarchal and patrilocal society of Europe. The famous anthropologist Bronislow Malinowski found among the Trobriand Islanders of the New Guinea, who have matriarchal and matrilocal patterns of the family, that this complex of rivalry and unconscious hatred did not exist between father and son as was observed by Freud in Europe. It existed, on the other hand, between maternal uncle and nephew. The cause of this unconscious hatred, says Malinowski, is, therefore, not sex and mother fixation as held by Freud. Its cause is the authority which is exercised by the elders over the youngers.[1]

The proper conception of law requires complete perception of the totality of human life, which means the entire human life on the earth for all time to come, and the type of human

1. Malinowski; Bronislow; 'Argonauts of the Western Pacific', p. 244.

life Hereafter. The life in both the worlds is the same continuum. The Hereafter is only the other phase of the life being led in this world. The modern science, particularly the 'Theory of Relativity' and the 'Theory of Entropy', emphatically supports religion on this account.

It is possible for God Almighty alone to know with precision what rules of conduct are most expedient for the majority of humanity in this world. Only he can tell whether the two phases of human life have been causally interrelated or not. If so, what rules of conduct in this world cause good effects in the Hereafter and *vice versa*. He, therefore, blessed the human beings with the Divine Revelation and gave them the body of rules of conduct which are most suitable for the maximum number in this world. The conformity to those rules causes good effect (the Heaven) in the Hereafter, while the non-conformity leads to bad results (the Hell).

The Islamic Law, therefore, is defined as "the body of rules of conduct revealed by God to His Prophet (peace be upon him) whereby the people are directed to lead their life in this world".

The salient and comparative merits of the definition of Islamic Law are as follows:—

(*i*) It has been unanimously given by the Muslim jurists like Abū Hanifā, Shāfi'ī, Mālik, etc.

(*ii*) Unlike the definition of Austin, Islamic Law is not given by any ruler. It has been revealed by God.

(*iii*) Unlike the definition of Salmond, Islamic Law remains valid whether recognized by a state or not.

(*iv*) Unlike the definition of the German Historical School, its origin is not custom and traditions, but it originates from the Divine Revelation only.

(*v*) It is so comprehensive and all embracing that it covers every aspect of a legal system: Personal Law, Constitutional Law, International Law, Criminal Law, Mercantile Law, etc.

(*vi*) It is not in the nature of 'should be'. It lays down what the law is, like laws of the physical sciences. It keeps in view the expedience of the majority of the human beings in this world for all times to come, and the corresponding effects of the actions in the Hereafter. Every act of all the human beings must fall in one of the following categories: (1) Obligatory (واجب); (2) Recommended (مستحب); (3) Approved (مندوب); (4) Permitted (مباح); (5) Disapproved (مكروه); (6) Prohibited (حرام). These categories have been made according to the effects of the actions in the Hereafter. The acts which will have good effects are obligatory. Those which will have satisfactory, indifferent undesirable or bad effects are termed as recommended and approved, permitted, disapproved and prohibited respectively. It is in the Holy Qur'ān:[1]

> "Then shall anyone who has done an atom's weight of good, see it. And anyone who has done an atom's weight of evil, see it." (Q. 99 : 7).

This heirarchy of laws is a miracle of Islam. This demonstrates that the legal system is so harmonious that a direct conflict between the two or more rights or obligations is impossible.

The Western definitions and theories of law can be divided into Positivism and Idealism. The positivistic definitions are mainly concerned with what law *is*, and the idealistic definitions are inspired by what law *ought to be*. The main exponents of positivism are John Austin, Hans Kelsen and Roscoe Pound. Austin and Kelsen are the Analytic Positivists whereas Pound is Pragmatic Positivist.

According to Austin law is a command of the Sovereign. This legal theory shifted the emphasis from theories of justice to the national sovereign state as the repository and source of legal

1. 99. 7.

power. The German jurists Jhering and Jellinek further developed Analytic positivism. Kelsen and his followers known as the *Vienna school* have remarkably developed and elaborated this concept by their *Pure Theory oj Law*. They divest law completely from justice and consider it as an apparatus of compulsion to which no political or ethical value is attached.

Bryce, Gray, Dicey, Lauterpacht, Salmoud and Friedman have surelv citicised Analytical positivism. Positivism is the characterisation of criminal law. It ignores the spheres of private litigation or prosecution. It fails to explain heirarchy and graduation of legal norms which imply recognition of normal and natural valus. Further this theory offers no explanation to the conflicting interpretations of a statute or a precedent.

Roscoe Pound is the founder of American Sociological Philosophy. He is also known as the American Realist and Pragmatic Posititivist also. He is influenced by William James' Pragamatic Philosophy and thinks the end of law in maximum satisfaction of needs of the society. Law must be determined by social facts which means 'a conception of law in flux and of society which changes faster than the law.'[1]

Where Positivism is victim to conflicts and tensions; Idealism also cannot offer any standard of jusuce. It is based on Philosophical reasoning which is ever-changing. The Western Legal Thought has failed to effect reconcilitation between Positivism and Idealism. The *Sharī'ah* or the Islamic Law combined in it the *is* and the *ought* of law. Being the command of God, the Supreme Sovereign, it is Positive Law in Ideal Form.

Just as a translation of the Qur'ān cannot have the status of the Qur'ān. The Qur'ān is only the Word of God if in Arabic. Similarly the *Shari'ah* is only the Qur'ān and the *Sunnah* which has got the ultimate legal status. The jurists have extracted rules of action from the Qur'ān and the *Sunnah* in a systematic

1. Friedman, *Legal Theory*, p. 296.

manner. The collection of those rules of action is calld *Fiqh* (فقہ) which literally means deep understanding or knowledge (of the *Shari'ah*). Legally it cannot claim finality and is liable to be reviewed by the jurists and the judges in the light of sound arguments from the Qur'ān and the *Sunnah*. Although it is amenable to further *Ijtehād*, *Fiqh* practically enjoys the force of law. It is definite in proof (قطعی الثبوت) being based on the Qur'ān and the *Sunnah*, and probable in interpretation (ظنی الدلالت). The word *Fiqh* was originally used by the Prophet (peace be upon him) in various traditions.

The Orientalists

Joseph Schacht says in *An Introduction to Islamic Law* that this scale of five classifications was borrowed by the Muslims from the Stoic philosophy. History does not provide any evidence that this scale was adopted by the Muslim jurists from the Stoic philosophy. On the other hand it is a historical fact that the Islamic Law was codified according to this scale much earlier than the Greek philosophy was translated and was made known to the Muslims. None of the great Muslim jurists like Abū Hanifā and Mālik had acccss to the Stoic thought. Schacht himself is unable to give any argument to support his view. He is conscious of the weakness of his claim and has admitted that he is unable to point out with certainty the period of this adaptation. The other significant factor, which exposes Schacht's bald statement, is that the Stoics' (Socrates, Plato and Aristotle) never developed the scale of values in their legal system. They even did not propound a comprehensive legal system.

In addition to this the Orientalists have invented discussion of the History of Islamic Law. This is to indicate that an evolution has taken place in the Islamic law wherein the human mind and the elements alien to Revelation have significantly contributed. Coulson has written a complete book on this subject. There should be no confusion about it that the History

of the *Shari'ah* is the history of the last twenty three years of the life of the Holy Prophet (peace be upon him). There can be, however, the history of the compilation and codification of the *Fiqh* in the present shape and form.

II—DEFINITION OF JURISPRUDENCE

In the words of Salmond

> "If we use the term science in its widest permissible sense, as including the systematized knowledge of any subject of intellectual inquiry, we may define Jurisprudence as the science of Civil Law."

And according to him it has three kinds, namely:

(1) *Legal Exposition.*—Dealing with what the law actually is;
(2) *Legal History.*—Dealing with how any legal system came to be so; and
(3) *Science of Legislation.*—Dealing with as the law ought to be, and what is the object of law. In fact this kind is the scope of the subject of Jurisprudence.

The first kind is a matter of data and the second kind requires information only. It is the third kind which is important and needs systematic study. Unfortunately, the scientific study of this aspect is not possible. There are more unsubstantiated opinions on the issue of object of law than the very number of jurists. Lord Wright is of the opinion that:

> "Law is not an end itself. It is a part of the political system of a nation, and it owes its existence to the objects of the Government.—In the light of my experience and study, I have reached the conclusion and believe that the first and basic object of law is the search for justice."[1]

Then, the question arises what is justice? The answer to this question again fades away into the nabulae of inconsistent theories of metaphysics.

It is not possible to call the Western Jurisprudence as the

1. *Interpretation of Modern Legal Philosophies*, p. 794.

Science of law in the strict sense. The quality of being systematic is not the distinctive characteristic of a scientific knowledge. The study of the subjects of Fine Arts like Music, Painting, Poetry, etc. is no less systematic than any other subject. The universally accepted criterion of a scientific subject is the objective verification or testibility. Every scientist or scholar of a particular subject may test the validity or invalidity and truth or falsehood of the inferences drawn by anybody else. If a physicist says that a body falls on the earth with an acceleration of 32 ft./sec./sec., any other physicist is in the position to test the truth of this hypothesis. Similarly, Professor Toynbee has propounded a theory about the rise and fall of human civilizations. He supports his thesis that a civilization rises due to fear and competition with the other, from the historical data. Any historian can challenge or support this theory with the help of historical data. The technique employed for objective verification in a particular scientific subject may be different. In Chemistry it is laboratory test, in History it is historical record, in Sociology it is statistical data, etc. But one thing is certainly there. That is the objective verification or testibility independent of the personal bias. Sense perception is not a necessary prerequisite of a scientific knowledge. People go on perceiving things physically yet they are not doing scientific research. Objective (independent of personal bias) verification is the real requirement. Physical sciences do utilize techniques which make sense perception possible. But there may be the techniques which are otherwise and yet fulfil the requirement of objective verification. For instance, modern History is a science although the past events cannot be perceived.

The objective testibility requires two conditions to be fulfiled :

(*a*) *Existence of Unanimous Standard*

There must be something which is unanimously con-

sidered to be the standard of right and wrong, or truth and falsehood. Without that objective verification is impossible. In Chemistry laboratory test and in History the historical data are the standards of validity or invalidity, accepted unanimously by the research scholars of the respective subjects.

(*b*) *Comprehensiveness of the Standard*

The standard must be so comprhensive that all the knowledge of that subject must be derived from that standard. If some knowledge is derived from some other sources, its validity will not be testible in terms of the accepted standard. All the knowledge of Chemistry must be inferred from the laboratory observation so that its objective verification may become possible in the chemical laboratory.

The Western study of law does not fulfil these conditions. There does not exist among the Western world any unanimous standard on which the truth and falsehood of the object of law may be empirically verified. Every law which is made there, claims its justification and support from some subjective theory or approach. The critics of that law base their views on some other theory. The laws, enacted by Hitler carried support from the theories of racial discrimination. The societies which are influenced by the *laissez faire* theory of Adam Smith, maintain that, as far as possible, state should not interfere in the economic activity of the individuals. There are other societies also which follow Marx and hold that the laws should be enacted to enable the state to control all the economic activity of the people. Every one of them has got the reasons which according to him are irrefutable. The only accepted standard there can be that the human intellect gropes by confused reasoning and blind curiosity, yet the truth is not loosened.

چلتا ہوں تھوڑی دور ہر اک راہرو کے ساتھ
پہچانتا نہیں ہوں ابھی راہ بر کو میں

"I follow for a while every traveller, but I do not know yet who is my guide."

The two rules of natural justice and a few principles of fundamental rights are not unanimously recognized standards of right and wrong. The Law of Contempt violates the rule of natural justice that nobody can be judge in his own cause, yet it claims its merits. The socialist society of the West condemns the fundamental right to hold property maintaining that it is meant to safeguard the interest of the capitalist class.

Even if, it is admitted that the two rules of natural justice and a few concepts of fundamental rights have unanimous recognition and can be said to be the standard, all the Western law cannot be derived there from. A few sections of the Procedural Laws and some articles of the Constitutional Law will be covered. The rest of the Criminal, Civil, Revenue and International Law will have to be based on something else. This leads to the irresistible conclusion that the Western study of law is not at all scientific. If *science of law* is the definition of Jurisprudence, as done by Salmond, the Western knowledge of law may be anything but it is certainly not Jurisprudence.

On the other hand, the Islamic study of law filfils all the pre-requisities for a subject to be scientific. It has got a unanimously accepted and comprehensive standard of truth and falsehood. That is Revelation (وحی) in the forms of the Qur'ān and the *Sunnah*. Every Muslim jurist must accept that this is the real and true standard, otherwise he is not a Muslim. It is not necessary that the standard of one field of knowledge should also be acceptable to the scholars of the other fields. The standard of Chemistry may not be acceptable to a Biologist or a Sociologist. Similarly the standard of the legal system of Islam may not be acceptable to the scholars of the other systems of law; but it must be acceptable to every research scholar of the Islamic legal system. And, in fact, it is so. Secondly, the standard of the Islamic system is so comprehensive that all the

legal aspects like constitutional, international, civil and revenue, have been thoroughly dealt with by it. Any law in any field can be derived from it by any jurist and the others can easily verify the truth or falsehood of that law in the terms of the Qur'ān and the *Sunnah* (the standard). The definition of Islamic Jurisprudence, therefore, is

"The scientific study of law"

This is due to its scientific nature that there is almost no difference among the accepted Muslim jurists and their legal expositions are almost unanimous. The much talked of difference among the Schools of Jurisprudence is based on ignorance. There is unanimity on the three-fourth of the law and the differences in the rest one-fourth are rarely in the matters of prohibited (حرام) and obligatory (واجب); but are mostly regarding the undersirable (مکروہ) and the better (مستحب). This is the difference of degrees and is called *Ikhtilāf* (اختلاف). This is not difference of categories or extremes which is called *Iftirāq* (افتراق). It is the latter which causes practical hindrance and is condemnd. The former must exist among the people who utilize their intellect. It is the sign of civilization.

It is also noteworthy that whatever divergence of opinion exists among the Muslim jurists, it is in the sphere of the Family Laws. There is a little difference of opinion among the Muslim jurists on the provisions of the Constitutional Law, International Law, Law of Crimes, Law of Transactions and the principles of Evidence.

Notwithstanding the divergence of opinion and the splits in the community, there remains a unanimity among the Muslims on unitarian belief, the Qur'ān, the Prophethood of Muhammad (peace be upon him) and the principal forms of religious observance. There are two main sects of the Muslims, the *Sunnis* and the *Shi'ās*. Their schools of law do not carry any significant differences. Hossein Naṣr says:

> "As far as the specific teachings of Shari'ah are concerned, the *Sunni* and the *Shiite* schools are nearly the

> same except in the question of inheritance where, according to *Shiite* Law, in certain cases the female line inherits more than in *Sunni* Law. Otherwise there is little disagreement between them."[1]

And in the words of Grunebaum:

> "The Law of the *Shiā* differed from that of the *Sunnis* in only a few points of major importance. Aside from minor changes in *Ṣalat* ritual, there would not have been much to emphasise the cleavage of the groups in their daily relations."[2]

On the other hand ;

> "Christimity is such a complex phenomenon that it is difficult to say anything significent about it that will carry the assent of all Christians."[3]

Islam appealed to reason and *Ijtehād*; and it is not simply a matter of personal belief and conscience; it involves at the same time the realisation of a social ideal, and the establishment of a body politic with its system of government, laws and institutions. This calls for hypothetico-deducto-inductive method of reasoning. This is another name of the scientific method. The differences do occur among the experts engaged in this method but such differences are resolvable and are practically insignificant. In Physics there is a persistent difference of opinion among the physicists regarding the nature of light. Some say that it is in the form of wave-lengths while the others hold that it comprises of small particles. But while the Laws of Light are put in application, such differences do not become a problem.

The differences are among the Muslims and not in Islam. As such those are resolvable and this is merely an administrative probelm. This is just like the judges who differ in the interpretation of law and not in the body of law. The mode of

1. Seyyed Hossein Narr: *Ideals and Realities of Islam*, p. 105.
2. Gustav Gurnebaum: *Medieval Islam*, 189.
3. Smith, Huston: *The Religions of Man*, p. 301.

resolving differences has been devised in the form of the Institution of Judiciary. A similar device is prevalent among the Hanafite jurists in case there is difference of opinions.

The Orientalists

The principles of Jurisprudence are the back bone of the Islamic Law. These principles render the derivation of laws from its sources to be objective. The other jurists can check the validity of the legal inference of any jurist with the help of these principles. These are just the scales of Physics and test-tubes of Chemistry. Their significance has been stated by Gibb in the following words:

> "The Kor'ān and the Traditions are not, as it is often said, the basis of Islamic Legal Speculation but only its sources. The real foundation is to be sought in the attitude of mind which determined the methods of utilizing these sources."[1]

The Orientalists assert that these methods—Jurisprudence —were invented by Shāfi'ī which is not true. In fact, Shāfi'ī compiled the priciples of Jurisprudence in the form of a book for the first time.[2] The principles were already existing and had been learnt by the Companions (صحابہ) from the Prophet. To detach the link of Jurisprudence from the Holy Prophet (peace be upon him), Margoliouth says that the letter addressed by 'Umar to Abū Mūsā Ash'arī which enumerates all the principles of Jurisprudence, is unauthentic.[3] The complete text of this letter has been narrated through authentic chains by twenty-eight authoritative works. Some of them are Balādhuhrī: *Ansāb al-Ashrāf*, v. 2, p. 623; *Daraqutani*, v. 2, p. 512; Behaqī *Sunan-al-Kubrā*, v. 10, p. 150; Sarakhsī: *Mabsūṭ*, v. 16, p. 65; Ibn Khaldūn, *Muqaddimā* p. 183, etc.

After Margoliouth, Emile Tyan wrote a thesis for his

1. Gibb, H. A. R.: *Mohammandaism*, p. 74.
2. Shah Wali-Allah: *Inṣāf*, p. 28.
3. Margoliouth: *'Omer's Instructions to the Caḍi*, in JRAS 1910, p. 307.

doctorate wherein he has developed and elaborated the arguments of Margoliouth. Joseph Schacht has also expressed the remarks without putting forth any arguments:

> "The instructions which the caliph 'Umar is alleged to have given to Kādīs, too, are a product of the third century of Islam'.'[1]

The main points of Margoliouth are as follows:

(*i*) The word '*Qiyās*' has its origin in the Hebrew word '*Hekish*'.

Even if his view is accepted, it does not damage the authenticity of the letter. There were so many Jews who were contemporary of 'Umar.

(*ii*) Al-Jahiz has narrated the letter and he belongs to Baṣrā.

There is no harm in this fact also. The letter is addressed to Abū Mū ā Ash'arī who was posted at Baṣrā.

(*iii*) Abū Mūsā Ash'arī died some-where between 42 and 52 Hijrā, and there is a gap of time between him and the narrators of the letter.

There is no weight in this point also. The original manuscript of the letter was in the custody of Abū Mūsā's family and it was received from his grandson Sa'īd bin Abū Burdā bin Abū Mūsā Ash'ārī. Moreover, there are chains of narrators which reach without any break up to 'Umar; and which were probably not known to Margoliouth. Two of them have been recorded by Muhammad Shaibānī in *Kitāb al-Aṣl* and by Ibn Sa'd in *Tabaqāt*.

(*iv*) How 'Umar could write such a comprehensive letter at that time!

The reply is that 'Umar did, and he could write this letter.

1. Schacht, J.: *An Introduction to Islamic Law*, p. 16.

The following is the text of the letter:

"Jurisdiction is to be determined on the basis of the Qur'ān and the *Sunnah*. First understand what is presented to you before passing any judgment. Full equality for all (litigants): in the way that they take places before you, and in the way you look at them, and in your jurisdiction. The burden of proof is on the plaintiff, and the oath is upon the defendant. Compromise is always the right of the litigants excepts if it is against the law

الفهم الفهم فيما يختلج في صدرك مما لم يبلغك في الكتاب والسنة و اعرف الأ مثال والأ شباه و قس الامور عند ذالك ثم اعمدالى أحبها الى الله تعالى واشبهها بالحق فيما ترى ـ

clear understanding of every case that is brought to you for which there is no applicable text of Qur'ān and *Sunnah*. Yours, then, is the role of comparison and Analogy, so as to distinguish similarities and dissimilarities. Never succumb to anger or anxiety, and never get impatient or tired of your litigants."[1]

1. Ibn Qayyim: *I'lām al-Muwiqqi'īn* v. 1, p. 86.

2

Sources of Islamic Law

The basic source of Islamic Law is Divine Revelation This has been given to us by the Prophet (peace be upon him) in two forms. One is the direct Word of God—The Qur'ān, other is indirect Word of God—The *Sunnah*. These two forms of Revelation are called the roots (اصول) of Islamic Law. Four questions arise at this stage:

1. What is the basic philosophy of delimiting the source of Islamic Law to the Revelation?
2. Why Divine Revelation is indispensible and the same object cannot be achieved by means of secular human reasoning?
3. In case of conflict between the legal theory based on provisions of Revelation and that derived from secular human reasoning which one should prevail?
4. Why Divine Revelation has been spilt into two forms; does this have any sociological significance?

All the four questions may be answered as follows:—

1. Basic wisdom

The fundamental basis of every Muslim's belief is the Unity of God and the Prophethood of Mohammad (peace be upon him). The Unity (توحید) of God means that everybody except

God is governed by and is subjected to the physical laws of nature. If somebody claims to be above the realm of cause and effect or believes that any prophet, pious person or angel can exert his power independent of the laws of cause and effect, he commits the heinous sin of *association* (شرک). The term *Ilāh* (الٰہ) signifies the Being Who can cause harm or favour independent of the ordinary course of nature. Even the laws of Nature are made and governed by Him, and He uses the forces of Nature in favour or against according to His Will. It is imposible to avoid His harm and to check His favour.

وَإِنْ يَمْسَسْكَ اللَّهُ بِضُرٍّ فَلَا كَاشِفَ لَهُ إِلَّا هُوَ وَإِنْ يُرِدْكَ بِخَيْرٍ فَلَا رَادَّ لِفَضْلِهِ۔

(یونس : ۱۰۷)

"If God wants to cause harm to anybody, nobody, can check it except He, and if He intends to give benefit to anybody, nobody can stand in the way."

The translation of the word *Ilāh* is 'the one worthy of worship'. Worship has been defined by Ibn Qayyim as follows:

العبادة عبارة عن الاعتقاد والشعور بان للمعبود سلطة غيبية فوق الاسباب يقدر بها على النفع و الضرر فكل دعاء و ثناء و تعظيم ينشاء من هذالاعتقاد فهی عبادة ۔

"Worship follow from the belief about somebody's supernatural power over and above the natural course of cause and effect, which enables him to cause benefit and harm. Therefore, every call, praise, respect, action etc. based on such a belief vis-a-vis that being, will be termed as worship (عبادت)."[1]

When only God is *Ilah* and everybody except God is equally bound by His created course of events, it is, therefore,

1. Ibn Qayyim : *Madārij as-Salikin*, v. 1, p. 40.

only He Who is worthy of dictating the 'dos' and the 'don'ts.' Every body should surrender only before Him because nobody can have the narrowest escape from His action.

Islam, literally, means surrender. A true Muslim quite reasonably surrenders before God and before nobody else. When all the human beings are equally bound by the chain of natural laws nobody has the right to legislate, or dicate 'dos' and 'don'ts' for the others and ask them to obey. Those who claim to have the right of independent legislation and also those who obey them commit the sin of *association.*

أَمْ لَهُمْ شُرَكَاءُ شَرَعُوا لَهُم مِّنَ الدِّينِ مَا لَمْ يَأْذَن بِهِ اللَّهُ ۔ (شوریٰ : ۲۱)

"Have they got the associates who legislate for them the rules of life which have not been given by God."
(Q. 42 : 21)

The main confrontation of Moses with the Pharoah was on the assertion of Moses that the legal sovereignty vests exclusively in God and the arbitary verdic of the Pharoahs could not legitimately have the force of law.[1]

The concept of democracy also aims at eradicating the evil of a man governing a man. But practically it fails to achieve this objective. There remains dichotomy of the ruler and the ruled. The people are in fact not governed by themselves. After the elections the will of the reprsentatives emerges and they legislate as they like. The general masses are bound to obey them. It is, moreover, the will of the majority which governs the society. The minority has no alternative except to surrender and be governed according to the laws laid down by the majority.

Islam has, however, achieved this goal. In Islam legal sovereignty vests only in God Almighsy. He has revealed His dictates of obligations (وجوبات) and prohibitions (محرمات) to the

1. Syed Qutb: *Khaṣāiṣ al-Taṣawwar-al Islāmī*, v. 1, p. 230.

Prophet (peace be upon him) and has delegated to him the authority to explain and practically demonstrate those before the people. The basic sources of Islamic Law are, therefore, the Qur'ān and the *Sunnah*. Every person or body of persons who claims or is taken to be legally sovereign commits the most heinous sin of *association* (شرک). Islam thus grants complete freedom to everyone from the bondage of his fellow beings. There is no division among the human beings that some should make the laws and others should obey. Everybody is equal and is supposed to obey the Divine Laws which have been laid down for every status and role in society.

2. Necessity of Revelation

During his earliest days the man is guided by his instincts. He at once starts suckling his mother. Then he seeks guidance from his senses. Up till that stage he is in no way different from animals. After this the stage of reason comes when he differentiates himself from animals. While utilizing this capacity of reasoning, he understands and compares things and ideas. He makes discoveries and gives new applications to the already existing knowledge, but his findings cannot claim finality. *Hundred per cent probability is impossible.*[1] There always remain the domains of doubt, and man cannot lead the life of doubts. He wants to know with cerntainty, from where he came, what is his goal and what for he is. The fourth stage of development of a normal human mind becomes essential. That is a sure and undoubted basis of the whole superstructure under which he has to lead his life. Mujaddid 'Alif Thanī writes:[2]

"مقصود آنست کہ بہ نسبت معتقدات یقینے و اطمینانے حاصل کند کہ ہر گز شکک زائل نہ گردد بایر اد شبہ باطل نہ شود چہ پائے استدلال بے تمکین بود۔"

1. Goode & Hatt: *Methods in Social Research*, p. 21.
2. *Maktūbāt*, v. 1, p. 333.

> "The object is that the people should have such surety and satisfaction regarding their beliefs that nobody may be able to create doubts into that. And simple reasoning has got very weak foundation."

The discovery of such a sure and satisfactory basis is not within the competence of mankind. Here the blessing of God comes to help. The state of dissatisfaction due to being unaware of Divine Guidance is called by the Qur'ān *Ḍalālat* (ضلالة). God blessed mankind with His Guidance (هدايت) which He revealed on the Prophets, and thus changed the state of dissatisfaction into that of satisfaction. This process of change has been described in the verse :

وَوَجَدَكَ ضَآلًّا فَهَدٰى۔ (الضحیٰ : ۷)

> "And He found you unaware of the right path, so He guided you towards that." (Q. 93 : 7)

Arnold Toynbee, while emphasising the need of religion, has said :

> "Religion was indispensible for human beings and without it the existence of man was not possible. Religion was essential for solving the most complicated problems of the individuals and the society. In modern scientfic advancements, religion has still to play a better and important role for the preservation of the personality of man".[1]

In this context Iqbal says:

> "Humanity needs three things today: a spiritual interpretation of the universe, spiritual emancipation of the individual and basic principles of universal import directing the evolution of human society in a spiritual basis. Believe me, Europe today is the greatest hindrance in the way of man's ethical advancement. The Muslim, on the other hand is in possession of these ultimate ideas on the basis of a revelatio1 ."[2]

1. *The Islamic Review* : London, January 1960, p. 30.
2. *The Reconstruction*, p. 183.

Without a spiritual basis any legal or moral system cannot claim to have a binding force for the human beings because its truth would always be questionable by anybody who likes. Voltaire was visited by a priest during the last days of his life. The priest summoned him to confession. "From whom do you come?" enquired the sick man. 'From God', was the reply. When Voltaire desired his visitor's credentials the priest could go no further and withdrew. Is the moralist or the law maker without some spiritual base in better case? Unhappily no! He cannot speak in the name of any accredited body of opinion but only in his own. In the absence of religion, where to look for the authority to enforce upon human beings the binding moral principles? How to show that such principles exist or are in any way binding at all? There, we have the unanswered riddle. There, we have the philosopher's stone, the gem of price which has been sought with diligence, with anxiety, yet in vain. Leibnitz has said:

> "In order that it may be concluded by a universal demonstration that everything honourable is beneficial and that everything base is hurtful, we must assume the immortality of the soul and the Ruler of the Universe, God."

No law except that based on Revelation can be unbiased, absolutely true and claim the right of unquestioned obedience.

3. Conflict betweeu Revelation and Secular Reason :

Revelation is not opposed to reason. It, rather, appeals to reason. God has directed to argue with the disbelievers:

> "And argue with them in ways that are best" (Q. 16 : 125).

This is possible only if the arguments are advanced in an intelligent manner and on sound reasoning. God has also praised the people who possess intelligence and reason. Shafi'ī in *al-Risālā* has used the word *Ijtehād* synonymously with the word 'reason' (عقل). This is why in the context of conflict

with Revelation (وحی) we have not used the simple word 'reason' but, instead, have employed the phrase 'Secular Reason'. By Revelation we mean the knowledge derived according to the recognised principles from the texts of the Revelation—the Qur'ān and the *Sunnah*; and by Secular Reason we mean the inference drawn from the axioms and foundations other than Revelation, in accordance with the method and techniques recognised by the experts of that particular subject which may fall in the domain of Science, Philosophy or Law.

There have been instances in the Muslim History when some scholars failed to take a balanced view, and under the spell of the secular knowledge, adopt an emotional attitude and restricted the word 'reason' for that only. They assume the knowledge based on Revelation as devoid from reason, and stretch and distort the meanings of the revealed texts to reconcile with the secular knowledge. The rejection of the secular knowledge all together is also not a sane view and reflects fanaticism.

The experts of Greek Philisophy among the Muslims like al-Kindī, al-Fārābī and Avicenna (ابن سینا) restrict the word 'reason' for the Greek thought. They interpret the Revelation irrespective of its manifest and traditional meanings. They stretch the Qur'ānic texts and the Traditions to the extent of misinterpretation, so that the findings of the Greek Philosophy are rationalised. They reinterpret the whole of Islam from their own philosophical stand point. They teach superiority of their reason to Revelation.

Al-Ghazālī gave the fatal blow to the approach and the teachings of these philosophers. He wrote *Incoherence of the Philosophers*'[1] wherein he quotes Avicenna liberally, without naming him, and refutes his arguments. He takes his stand on Revelation and fortifies that with the support of reasonable arguments. At the same time he questions the Philosophers' findings by pointing out the fallacies of reason therein. With

1. *Tahāfat al-Falāsaphā* (تهافة الفلاسفة).

al-Ghazā'ī (505/1111) the voices of Palto and Plotinus stopped speaking in the domain of religion. The Greek tradition was defeated, and the secular intellect of the Muslims had its recourse to science. Thence forward the battle of religion with the philosophers was over and the future belonged to revelation, whether allied to scholastic theology of the Ash'arī pattern, or fundamentalism after the manner of the Hanbalīs, or the unique theosophy introduced by Ibn 'Arabī (638/1240). Averroes (ابن رشد) (595/1198) wrote *Incoherence of Incoherence*,[1] in reply to al-Ghāzlī's *Incoherence of the Philosophers*, and tried to revive the pattern of al-Farābī and Avicenna. But his voice was silenced by Ibn Taimīyā's (728/1328) thundering denunciation.

Reason is a relative term. It means application of mind in a systematic manner. Its parallel in Arabic is *'Aql* which means to check and discriminate between right and wrong. Its techniques vary from subject to subject. Shah Rafi'al-Din Dehlawī says:

> "The word reason (عقل) has got various meanings. Firstly it means the capacity of mind to have deep understanding of a subject. In this sense all kinds of the knowledge are based on it. Secondly it signifies the knowledge which is derived from sense perception, common sense of the general people or a few premises popular among the philosophers. Such a knowledge is inferior to the principles of the *Shariāh* and the discoveries of intuition (کشف). It is in this sense that Jāmī and Dawwānī have claimed that their knowledge is superior to reason. Thirdly, it connotes deep understanding of the Reality in the light of principles recognised by the *Shari'āh*. This is the reason which is called the great argument of God and 'Alī has remarked about it that the people in the Hell will repent neither for not having said the prayers nor for non-observance of the fasts, but they will utterly regret for being devoid of reason; and they

1. *Tahāfat al-Tahāfat* (تہافۃ التہافۃ).

will say, "Had we but listened or used our reason, we would not have been in the Hell (al-Mulk : 10)."[1]

Religion and other subjects are, however, not like concentric circles which never touch each other. The theories and laws propounded by Religion and other fields of knowledge may sometimes overlap and be conflicting. Islam does not accept the position which St. Thomas Aquinas gave to Christianity:

> "I know by reason that something is true because I see that it is true; but I believe that something is true because God has said it. In those two cases the cause of my assent is specifically different, consequently, Science and Faith should be held as two specficially different kinds of assent."[2]

The reason is that Islam is not afraid of sound achievements of human mind in any field which are based on logical techniques. There cannot be any inconsistency between the Word of God and the Work of God. If sometimes there transpires a conflict between the two there should be an explanation for that and a mode of its resolution. In the forthcoming discussion a methodology has been worked out. For this we have benefited from Averroe's *Faṣl al-maqāl* (فصل المقال), Rāzī's *Asas al-Taqdīs* (اساس التقديس), Ibn Taimīyā's *Mawāfiqat ṣarīhil mā'qūl li-Sahīhil Manqūl,* (الموافقة صريح المعقول لصحيح المنقول), Pir Mehr 'Alī Shah's *Saif Chishti'aī* (سيف چشتيائی) and Ashraf Alī Thānwī's *al-Intibāhāt al-mūfīdā* (الانتباهات المفيده). In addition to the works of the Muslim scholars, the books on Logic and methods of Scientific Research by J. S. Mill, Goode and Hatt, Cohen and Nagel, etc., have been very useful.

Every knowledge has got its foundational principles or basic postulates. The arrangement and accumulation of all other elements of a knowledge in terms of the respective founda-

1. Shah Rafi'al-Din Dehlawī, *Damgh al-Bāṭil,* p. 196.
2. Gilson, E., *Reason and Revelation in the Middle Ages,* p. 73.

tional principles is called reasoning. The foundational principles or basic postulates or *grund norms*, are like alphabets and rules of grammar of a language. The rest of the knowledge is like vocabulary. Just as every language has its own alphabets and grammar, every knowledge has got its *grund norms*. An attempt to understand the elements of one knowledge in terms of the *grund norms* of other amounts to absurdity. Science, philosophy and religion are independent fields of knowledge. Each one has its own *grund norms*, and methodology.

In science, there are four important *grund norms*, the world exists, we can know the world, we know the world through our senses, and phenomena are related causally. Science, thus presumes the truth of these postulates and proceeds on these bases without applying mind at this stage. William Goode and Paul Hatt say:

> "Science itself rests upon a series of postulates, or assumptions, which are themselves fundamentally unproved and unprovable. We can assert that these postulates are true ; we can believe them ; but we cannot prove them. They reprsent those problems in the area of the philosophy of science which is usually called epistemology."[1]

Goode and Hatt name these postulates as the 'non-scientific bases of Science'.

In philosophy personal opinion of a philosopher supported by the stength of his arguments, is the basic postulate. This is termed as *a priori*. Every philosopher discards the other's *a priori*, and establishes his own. Spencer tried to explain all the social phenomena on the basis of analogy between society and biological organism. The later scholars who emphasised Positivism discarded his Evolutionism.

In religion, Revelation is the *grund norm* and everything in religious domain is validated or invalidated according to the provisions of Revelation. All the same, religion has got a

1. Goode & Hatt : *Methods in Social Research*, p. 20.

mark of superiority over science. It encourages and invites the application of mind even at the foundational stage. The signs of prophethood (دلائل نبوت) conclusively satisfy the human mind regarding truth of a Prophet. The Prophet (peace be upon him) led an active social life for forty years. He had intimate friends, wife, children and other relations. He did business, acted as receiver and arbitrator at many occasions. After completing the 40th year, all of a sudden, he started pouring jewels of knowledge concerning ethics, metaphsics, history, political institution, economic institution, Criminal Law, Civil Law, Constitutional Law, International Law and Mercantile Law. He started reciting the passages from the Qur'ān which have miraculous literary value and unique style. None of the contemporary people could trace any worldly source of all these things. Nobody, whether foe or friend, made allegation that such and such thing was heard, read or learnt by him (peace be upon him) at such and such occasion. After being rationally, logically and fully convinced about the truth of his claim of prophethood, the people embraced Islam. In addition to this they saw many miracles at his hand. The Jews put him questions about Zulqarnain and the People of the Cave (اصحاب کہف). He could never answer these questions without the help of Divine Revelation. They were fully convinced that he was a true Prophet. The Qur'ān says about them:

يَعْرِفُوْنَهٗ كَمَا يَعْرِفُوْنَ اَبْنَآءَهُمْ۔ (البقرہ : ۱۴۶)

"They recognize him as they recognize their own children."

It was due to the vested interests and false prestige that some of them did not join him, otherwise they knew well that he was a Prophet. The *grund norms* of science are accepted out of blind faith while those of religion are believed after complete mental satisfaction. When one is satisfied about the truth of the claim of the Prophet that he is blessed with Divine Revelation, one is expected not to judge the details of religion on

the basis of the grammer of some other subject, but on the basis of the Revelation. Rūmī says:

آزمودم عقل دور اندیش را
بعد ازیں مستانہ سازم خویش را

'I tested the far-sighted mind. Then I surrrended myself.'

The methodology of science and religion is almost similar. The scientists as well as the Muslim jurists depend on objective standard for the validity of the inferences. In Physics the objective standard is laboratory experiment, in Sociology it is statistical data and in religion it is provisions of Revelation (the Qur'ān and the *Sunuah*). While the method of philosophy is subjective and is not based on positive evidence.

There can be four possibilities of conflict between the findings or the inferences drawn from Divine Revelation and secular human reasoning (science and philosophy).

(*a*) *Definite Revelation and Definite Secular Reasoning.*—All the valid findings and provisions of philosophy, science and religion are either definite (قطعی) or probable (ظنی). There are a few definite findings in science, none in philosophy and many in religion. The Muslim theologians call the definite provisions of Islam as the 'Religious Necessities' (ضروریات دین). Misinterpretation or disbelief in any of these amounts to apostasy.

The definite finding is universally accepted in the field of knowledge to which it belongs. Its truth and validity becomes self-evident. The unanimity on its validity rules out the possibility of error. The persons concerned with that particular branch of knowledge accept it without applying their mind. That two and two make four, that the earth is elliptical and revolves round the sun, that London is a city on the surface of the earth, that a Muslim must offer prayer five times a day, etc. are universally accepted or definite truths of the respective branches of knowledge. Nobody requires any sort of satisfaction before accepting these.

The probable finding is reached after the application of

mind and interpretation according to the methodology of that subject. Almost all the achievements of the human mind rest on the Theory of Probability. Probability refers to the chances that a given statement when made, is a true statement. Its conception relates to the amount of knowledge lying behind a statement whose probable truth is being evaluated. The fact that we work with probabilities means :

(*i*) That we may err in either direction. A judge may order an innocent person to be hanged although he has sufficient evidence on record to establish his guilt. A marketing study which compares the living habits of different groups may err by showing them to be different when they are really the same, or the same when they are really different. This error takes place due to the defect in the techniques by which the evidence to test the validity of a hypothesis is obtained.

(*ii*) That the finality has not been reached. The same inference or finding may be stated with more exactness. The Law of Gravitation as enunciated by Newton has been more exactly stated and evaluated by Einstein. The interpretation of a text of law done by one judge may be more perfected by the other. It is important that a probable finding is never arbitrary, it is always based on positive evidence. Practically it is quite safe to act under the usual assumptions of normal probability. One must however have a clear understanding of different probabilities when one recommends a legal theory over another.

The difference between definite and probable elements of knowledge is of degrees and not that of categories. The maximum possible probability within the competence of mankind makes a thing definite. A presumption of truth is attached to it and the people usually accept it without applying their mind to the reliability and the validity of the means through which it has come up. Where no presumption of truth is

attached and people accept after applying their mind, it i believed that scope for perfection of reason through which particular element of knowledge has grown, is there. Such thing is called probable. It can be said in other words; "th lesser the scope of perfection of reason, the more the probabilit of being true."

When something is conceived by mind without having an tendency of judging its truth or falsehood, such a state of min is called Imagination, If the mind starts working to scrutiniz whether it is true or false, and only one interpretation persis in the mind, this exclusive finding is Definite (قطعی). Th may have further three possibilities. If the exclusive finding in reality false, it is Compound Igrorance (جہل مرکب); if it in reality true but subject to change (ممکن الزول) it is Follow ing (تقلید);and if it is in reality true and also finality is attache to it, it is Faith (یقین).

In case the mind, instead of exclusive interpretatio retains both the interpretations of a knowledge being true a well as false, it has also three possibilities. If both the inte pretations have fifty fifty chances, it is Doubt (شک); if th chances of being true are less than fifty per cent, it is Suspicio (وہم) and if the chances of being true are more than fifty p cent, it is Probable (ظن).

The word *Zan* (ظن) is used, here in the technical sens Its literal meaning is quite different. Literally in the Qur'ā it sometimes signifies personal opinion, sometimes it is use in the sense of having good or bad presumption (حسن ظن وسوء ظن about the personal characters of the individuals.

Two factors determine the character of knowledge to b definite or probable.

(*i*) Reliability (ثبوت)—The material and data from whic the inferences were to be drawn and which are required t be interpreted may be true as well as false. The reporting an narration of facts, and transmission of the body of la may be authentic as well as unauthentic. The Qur'ān h

been communicated to us universally (تواتر). This means that all the texts of the Qur'ān are definitely reliable (قطعی الثبوت). A few Traditions of the Prophet (peace be upon him) are definite whereas the bulk of the traditions having not been univeraally reported (احاد) are probable in reliability (ظنی الثبوت).

(*ii*) Validity (دلالت)—Some times the interpretation is so clear that it leaves no room for another interpretation. For instance, two and two make four. This interpretation is definitely valid (قطعی الدلالت). In case the language of the text is ambiguous and the scope for further interpretation is there, it is probably valid (ظنی الدلالت).

Thus, in the context of being definite or probable, knowledge can be divided into four kinds:

(*i*) Definitely Reliable and Definitely Valid (قطعی الثبوت قطعی الدلالت)—

The fact of its existence is communicated through the medium which is definitely reliable, and its interpretation and meaning is also definitely true and valid. The injunction of the Qur'ān whereby saying of the prayer has been ordered (اقیمو الصلوة) falls in this category. Its text is in the Qur'ān which has been universally (تواتر) communicated to us. And there is definitely no other meaning of the word *Ṣalāt* (صلوة) than prayer.

(*ii*) Definitely Reliable and Probably Valid (قطعی الثبوت ظنی الدلالت)—

The judgment of the final court of a country under a specific section of law can be the example of this category. That a particular section of law under which the judgment is given definitely exists, but the judgment although final and given by the best brains, may have scope of further perfection of interpretation.

(*iii*) Probably Reliable and Definitely Valid (ظنی الثبوت قطعی الدلالت)—

The traditions which have been reported through

authentic chains (صحیح الاسناد) but the communication is non-universal (احاد), are probably reliable. If the texts of such traditions is clear and not amenable to various interpretations, they fall in this category. The rule of Inheritance that the female gets half of the share of the male is definitely valid, but the distribution of shares depends upon the proof of paternity (نسب) which is probable.

(*iv*) Probably Reliable and Probably Valid (ظنی الثبوت ظنی الدلالت) :

A definitely validated inference of science and a definitely proved provision of religion (اسلام) can never be in conflict. Ibn Taimiyā in *Al-Mawafaqā* (الموافقہ) and Ashraf 'Ali Thānwī in *Al-Intibahāt* (الانتباہات) have claimed that nobody on the surface of earth can give a single example of such a conflict. This is an argument in support of the miraculous truth of Islam.

(*b*) *Probable Revelation and Probable Secular Reasoning.*—The probability in philosophy is almost speculative. Its probable of today may totally be discarded tomorrow. In science the degree of probability is very unstable. Physics, the queen of sciences, claimed its degree of probability to the extent of 90%, but Einstein's Theory of Relativity has brought it down to about 70%. The social sciences are themselves very humble about their degree of probability.

The drgree of probability in Islam is comparatively much stable. Science lags behind in this respect due to the limitations of its Inductive Method. It is not practicable to test the validity of its hypotheses in the whole of the Universe. A part (sample) has to be selected for that purpose, and the test made therein has to be generalised throughout the universe. Here lies the main trouble. The sample may not be truely representative of the universe. The whole may exhibit properties quite distinct and different from the part.

Hydrogen and Oxgyen are parts of the water but both of them do not possess the property of making the things wet which the water does. Similarly, segment is part of circle but both have got many distinct geometrical characteristics. The necessary evil of generalization of the part-truth, which has to be owned by science, makes its degree of probability uncertain. Islam is safe from this problem. The Islamic provisions are not the generalized results of the limited observation. They have been revealed by the Omniscient God, Who is the Knower of the past and the future and Whose vision of the present is perfect.

The second factor which makes the degree of scientific probability uncertain is the reliability of the positive evidence from which inference is drawn. In spite of observing the necessary precautions the possibility of falsehood of evidence cannot be excluded. In the case of Islam so much scanning and sifting has been done by the Jurists and scholars that it happens very rarely that a research scholar is able to change the already established nature of Chain (سند) of a tradition. The Qur'ān has been transmitted universally (تواتر). It is definitely the same as it was revealed.

Under these circumstances, it is quite logical that in case of conflict between the probable inference of philosophy and that of Islam, the former should be discarded and the latter should be accepted. For instance, the Italian Criminologist, Lombrosso after conducting research on the skulls of the criminals formulated a theory of *Criminology*. It is known as the *Theory of Atavism*. According to this theory the cause of crime is the biological nature of the criminals. The mind of the criminal is under-developed and carries animal instincts. This theory being against probable meanings of the Qur'ān and the *Sunnah* must be rejected. The Qur'an says:

ظَهَرَ الْفَسَادُ فِي الْبَرِّ وَالْبَحْرِ بِمَا كَسَبَتْ أَيْدِي النَّاسِ - (روم : ۴۱)

"Mischief has appeared on land and sea because of

(the meed) that the hands of men have earned."

(Q. 30 : 41)

The Prophet (peace be upon him) has said:

كل مولود يولد على الفطرة و ابواه يهودانه و ينصرانه - (مسلم)

"Everybody is born on the nature of Islam, but elders make him Jew or Christian."

Lombrosso throws the responsibility of crime on the nature. Islam declares that the seeds of criminality are not inborn but are self sown.

(*c*) *Definite Revelation and Probable Secular Reasoning.*—When it is established that a probable finding of science and philosophy will be discarded in case it is in conflict with that of Islam, it goes without saying that a probable finding of science or philosophy cannot stand before a definite provision of Islam.

(*d*) *Probable Revelation and Definite Secular Reasoning.*—It is one of the miracles of Islam that whenever there appears to be a *prima facie* conflict between a definite finding of science and a superficial meaning of the Divine Revelation, an interpretation of the latter is possible which appeals to the human mind and is more plausible than the superficial meaning. It has been said in the Qur'ān about Zulqarnain :

حَتّٰى إِذَا بَلَغَ مَغْرِبَ الشَّمْسِ وَجَدَهَا تَغْرُبُ فِي عَيْنٍ حَمِئَةٍ - (كهف : ٨٦)

"Untill he reached the setting of the sun, he found it set in a spring of murky water." (Q. 18 : 86)

Somebody might take the superficial meaning that the sunset in the murky water is against the definite truth of science that the sun never sets in the water. In fact, the Qur'ān wants to describe Zulqarnain's sight of the sunset as it happens with everybody standing on the seaside at that time. This interpretation is more plausible with reference to the context of the verse and is in harmony with the scientific truth also.

Wherefore, no law except that based on Revelation, can

be unbiased, absolutely true and claim the right of unquestioned obedience. After discussing these reasons ; sociological as well as philosophical, for basing the law exclusively on Revelation we come to the discussion of the basic sources or roots of the Islamic Law. *The discussion of the fourth point will be taken up in the Chapter on the Sunnah.*

As a matter of fact, there is only one root or source of the Islamic Law. That is Revelation (وحی). If we go still deeper we see that the standard of validity and invalidity or right and wrong of rules of slamic legal system is the personality of the great Prophet (peace be upon him). Nobody saw things revealed to him. It is he who told us that this is the Qur'ān: the direct speech of God (متلو) and this is the *Sunnah* : the indirect speech of God (غیر متلو). His every act and saying was based on Revelation.

مَا يَنْطِقُ عَنِ الْهَوٰى إِنْ هُوَ إِلَّا وَحْيٌ يُّوْحٰى ۔ (النجم : ۳)

"And he does not even speak of his own desire, it is all revealed on him." (Q. 53 : 3)

It is he who said that the sources of the *Shari'āh* are two: the Qur'ān and the *Sunnah.*

تركت فيكم امرين لن تضوا ما تمسكتم بهما كتاب الله و سنة رسوله

"I have left with you two things: the Qur'ān and the *Sunnah,* if you hold them fast, you will never go astray."[1]

1. Mālik; *Muwaṭṭā'* V. 2 p. 208.

3

The Qur'an

The Qur'ān is the latest and the complete edition of Divine Guidance and this is the only book of God which has not been distorted as He Himself undertook its safety. The wisdom in selecting Arabic language for the Qur'ān seems to be that this is the most scientific language and due to the Qur'ān, its standard form is still the same as it used to be thirteen centuries ago. In this connection Browne points out: "The reason of the Revelation in Arabic, it is submitted, was the selection of choice for perfect expressions and forms. For it has been said that as a scientific language Arabic was essentially fitted by its wealth of roots and by the number of derivative forms each expressing some particular modification of the root idea of which each is susceptible."[1]

Compilation

This is the only book of Divine Origin which wos compiled in written form during the life-time of its Prophet (peace be upon him). The Qur'an itself indicates this fact :

لَا يَمَسُّهُ إِلَّا الْمُطَهَّرُونَ ـ (الواقعه:۷۹)

"Only the clean should touch it." (Q. 56 : 79)

1. Browwe: *A Literary History of Persia* v. 1, p. 4.

The possibility of touching arises only if it is in the written form. Further, God says,

إِنَّ عَلَيْنَا جَمْعَهُ ۔ (القيامه: ١٧)

"We are responsible for its compilation." (Q. 75 : 17)

Again, the Almighty addresses the Holy Prophet (peace be upon him) :

وَلَا تَخُطُّهُ بِيَمِينِكَ ۔(العنكبوت: ٤٨)

"And you have not written it (the Qur'ān) with your right hand." (Q. 29 : 48)

There are traditions narrated about the manner in which the Qur'ān used to be compiled :

(*i*) كان رسول الله صلى الله عليه وسلم ينزل عليه السور ذوات العدد فكان اذا نزل عليه الشئي دعا بعض من كان يكتب فيقول ضعوا هذا فى السورة التى يذكر فيها كذا و كذا ۔

"Different *sūrās* used to be revealed on the Prophet (peace be upon him), and when something was revealed on him he used to send for some of his stenos and dictate to write a particular verse in a particular *sūrāh* in the context of particular verses."[1]

(*ii*) اتانى جبريل فامرنى ان اضع هذه الايه بهذا الموضع من هذه السوره ۔ (مسند احمد ج ٢ ص ٤٠)

"The Prophet (peace be upon him) says, "The Gabriel came and asked to place this verse in this place of this *sūrāh*."

(*iii*) The Holy Prophet (peace be upon him) had appointed 42 stenos for the purpose of giving dictation of the Qu'rān.[2]

1. *Mukhtasar Kanzal-'ummāl*, v. 2, p. 48.
2. Alkatānī: *Kitāb al-Trātīb al-Adāriyā*, v. 1, p. 61.

(iv) قد كان القرآن كله مكتوبا في عهده صلى الله عليه وسلم لكن غير مجموع في موضع واحد - (الكتاني ج ٢ ص ٣٨٤)

"The whole of the Qur'ān was in the written form in the Prophet's period but was not bound in a single volume."

(v) During the days of the Prophet (peace be upon him) all the *sūrahs* had been separately compiled. The first Caliph Abu Bakr simply made all the *sūrahs* together and got bound in one volume.[1]

(vi) The people were at liberty to read the Qur'ān according to their own dialects but they started writing it also in their dialects. To avaid confusion the third Caliph 'Uthmān prepared numerous copies of the government copy of the Qur'ān prepared by Abū Bakr and sent those to all the provinces. He forbade the people to write the Qur'ān in the dialects other than that of the Qureish.[2]

None of the other Divine Books was written in the life time f the prophet to whom it was revealed. The Old Testament nd the New Testament were compiled much after the time of Moses and the Christ. This fact is clearly mentioned in the ible itself

> "So Moses, according to the will of the 'Lord' breathed his last in Mua'b and was buried there; but no one knows his grave."[3]

his means that the Old Testament was campiled at the time hen even the grave of Moses had disappeared. This is written n the Old Testament itself. Similarly the New Testament was ritten by the successors of the companions of the Christ. This ct is again written in the New Testament itself:

"As many have taken upon themselves to record what

1. Suyūṭī: *Itqān*, v. 1, p. 83.
2. Ṣālih al-Jāzāirī: *Tibyān fi Mabāhith al-Qur'ān*, p. 44.
3. *The Old Testament*, p. 201.

> has been transmitted to us by the companions, I have also considered it proper to enquire, scrutinise and write in arranged form."[1]

The Vedas are claimed to be the oldest Divine books. But it is interesting that Al-Bērūnī who visited India in the tenth century has written that a few days before he came to India, a Kashmīrī Pandit gave the Veda its written form. Before that a particular class of Pandit Brahmans used to retain it in their memory. Dr. Gupta has written:

> "The writing of the Vedas was considered to be prohibited for a long time. The Brahmans used to listen it from their teachers and learn by heart."[2]

The Qur'ān was revealed peacemeal to meet the practical requirements of the time. Had it been arranged in the manner in which it was revealed it would have become meaningless and confusing for seeking guidance. It is like a person who started writing different books on different subjects simultaneously. In the end if he arranges all of his writings chronologically it would look a ridiculous attempt. Every *Sūrah* of the Qur'ān is a self-contained chapter on its subject and every verse is indispensable in its context. A layman may say that there is no strict arrangement among the verses of the Qur'ān. He may say so about the stars in the sky also, but an Astronomer knows well that the misplacement of one star may cause havoc in the Universe.

Style of the Qur'ān

The Qur'ān does not contain law in the codified form. The reason is that it is not merely a Book of Law. It governs the whole of human life in a very wholesome manner. It convinces man to submit to God's Sovereignty and persuades him to liberate himself from the other bonds. It narrates what happened in the past with those who did so and those who did

1. *The New Testament*, p. 51.
2. Gupta: *Indian Philosophy*, v. 1, p. 16.

not. It tells him by its own reasoning his origin and his future. It lays down law at the proper places and points out, as well, that the legislative powers have been delegated to the Prophet (peace be upon him) also. Iqbāl says,

> "Its main purpose, as I have said before, is to awaken in man the higher consciousness of his relation with God and the Universe."[1]

In the words of Edmand Burke:

> "It is most copious on marriage and divorce, most precise in rules of inheritance, and if compared to Christianity (Bible), possesses far greater vitality and responsibility instead of being arbitrary and despotic. It has true democratic characteristics in form and substance."[2]

The Qur'ān is in the form of addresses which were revealed by God on different occasions, starting from the time when the Prophet (peace be upon him) made his first call to the people to submit to the Religion of God, and continuing till the Prophet (peace be upon him) completed his task in the form of a society fully organised, well integrated and patterned with all the basic institutions. Every address was suited to the occasion at which it was made. In the beginning the whole attention was devouted on the Unity of God, eradication of 'association' and boycotting the man-made customs. The belief-system and the morals were mainly discussed. After migration to Medinā, the Muslims had the opportunity of leading the life of an organised society. Now the injunctions regarding the laws of war, treaties, Law of Crime, Torts, Contracts, Personal Law, Mercantile and Constitutional Laws were revealed.

This method of building upon of the institutions is the most scientific, democratic and enduring. There is consensus of the modern sociologists on this point. Every institution consists of

1. *Reconstruction of Religious Thought in Islam*, p. 165.
2. *Speeches*, Vol. I, p. 104.

a content and a form based on that. Content is the basic idea or belief and form is the organization in which the spirit of that idea is maintained. The Qur'ān concentrated on the content during the Meccan period and on content and form both, during the *Medinese* period.

For an institution to be workable and thoroughly practicable, it is necessary that it should be practically demonstrated. However detailed the description of an institution may be, it cannot be practicable unless it is practically demonstrated. No student of science can perform his experiment simply on the basis of written instructions. Practical demonstration in laboratory is a must. Plato's theory of 'Ideas' also sheds light on this point. Ideas exist in abstract form. If simply conveyed by writings and speeches, it is humanly impossible to give them a complete practical shape. The people are not supposed to simply read and commemorate. They are under obligation to act and perform their roles. The Anthropologists, on the basis of their study of different societies have observed that people do not think logically during their social behaviour. They simply act in the manner of their predecessors. Logical thinking before action is possible only in case of the person who has got thorough knowledge of all the traits of his culture, interrelationship of the institutions and their objects and basic philosophies. Linton says:

> "One school of anthropologists has devouted much time and erudition to proving that uncivilised people do not think logically. This is essentially correct, the only error being that neither do civilized ones. Both apply logic when it is necessary for the attainment of particular ends, but neither civilized nor uncivilized apply it habitually, or under normal conditions, use it to test mutual consistency of the elements of culture to which they have been reared."[1]

If the Qur'ān had itself described all the principles and details

1. Linton; Ralph: *The Study of Man*, p. 362.

of Islamic society and culture, Islam would have not been practicable, at least for a common man. It would have been the concern of scholars alone and that, too, with practical limitations. But the Qur'ān is a book which, in the words of Iqbal, emphasized some of the detailed rules as foundation-stone of the structure of the institutions and delegated rest of this function to the Holy Prophet (peace be upon him) to complete and practically demonstrate that. God has not only given us the Qur'ān but also has sent His Prophet (peace be upon him) whom He has delegated the powers of legislation.

Regislative Functions of the Qur'ān

Although as professor Fitzgerald says in his book titled as 'Muhammadan Law':

> "The Qur'ān is an eloquent appeal (to Mulim ears a miracle of eloquence) to mankind and to the Arabs in particular, to obey the law of God which, it is (in the main) implied, has already been revealed or capable of being discovered"

yet, the Qur'an has influenced the creation of Islamic legal system in the following ways:

(*a*) The Prophet (peace be upon him) faced legal prolems and so did his companions and the Qur'ān provided guidance. In doing so, along with building up concrete behaviour patterns of the Islamic social system, it gave such texts (نصوص) which possess a definite legal element. There are about five hundred such texts. Most of these deal with the ritual law, and eighty of these provide the material which would be called legal by a Western lawyer. These eighty verses have been construed by methods of statutory interpretation, so as to extract the utmost ounce of meaning from them. For example, the intricate system of inheritance has been built up from about half a dozen verses only. The following verse can give the

entire Constitutional Law:

أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ - (النساء: ٥٩)

(*b*) Non-legal texts in the Qur'an, moral exhortations, and Divine Promises have been construed by reasoning to afford legal rules. Thus the texts, "Surely they say, usury is like sale, but God has made sale lawful and usury unlawful," and; "They ask thee concerning wine and gambling. Say—in both is sin and advantage for men (too), but the sin thereof is greater than the advantage," have all pervading influence on the whole doctrine of contract. The lawfulness of contract and those unilateral acts (e.g. *Kafalā*, *Iqrār*) which in Islamic Law resemble with contract, is mostly estimated in terms of their resemblance to sale and the unlawfulness in the terms of usury and gambling.
Similarly, the texts proclaiming that God will not punish anyone save for one's own sins,

وَلَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَىٰ - (فاطر: ١٨)

have been applied to debts which a person leaves unpaid at his death with far-reaching results in the law of administration of assets. The text making lawful the permit of water hunting

(أُحِلَّ لَكُمْ صَيْدُ الْبَحْرِ) - (المائدة: ٩٦)

has been restricted, by reasoning, to the fish only.

(*c*) By pointing out that the previous revelations have been corrupted the Qur'ān declared the legal material with the 'People of the Book' (اهل الكتاب) unreliable. It also called upon the people to abandon the customs of their ancestors in favour of the laws of God (Q. II: 170; V: 104). In any case it repealed the entire legal provisions available outside the sphere of the Book

and the *Sunnah*. It adopted certain previous customs as well. For instance, it made the sale lawful. But the condemnation being general and adoptation being specific, the legal principle will be, that the customary practices shall be presumed to be prohibited unless expressly adopted by Islam.

الاصل هوا لا عتصام بالكتاب و السنته ـ (مجموعه رسائل منيريه ـ ج ٣ ص ١٧٤)

(*d*) The Qur'ān converted the heathen Arabs to the belief that law is the direct command of God. Since it is the cardinal tenet of Islam that God is One, the whole law must emerge from Him. The believers are bound to search for that whole, which can be found, in addition to the Qur'ān, from the social system built up by the Holy Prophet (peace be upon him)—the *Sunuah*.

Rules of Interpretation

The interpretation of a legal text is governed by the principles called *istidlāt* (استدلال). The following are the important principles according to which words and phrases occurring in a text are interpreted. The object is to discover the legal provisions contained therein:

(*i*) *The General and the Sp cific* (العام و الخاص): A general word covers everything to which it is applicable. A general text cannot be limited except by another such text. Effort should be made, first of all, to reconcile two apparently conflicting propositions. About the waiting period (عدت) of the widows it has been laid down in the Qur'ān, "Those women whose husbands are dead should restrain themselves (from marrying again) for four months and ten days." In another verse of the Qur'ān the waiting time for the pregnant widows is until delivery. The two texts would be reconciled by holding that the period of waiting for a

widow is the remotest of the two, as the case may be.

When the conflict cannot be resolved and the two texts are of general import; one of them sanctioning a certain thing and another prohibiting it, the prohibitive speech will prevail. In case both the texts are of the same character and conflict cannot be resolved, the latter will repeal the former to the extent to which they are in conflict.

When two propositions, one of general and the other of specific import, conflict with each other; if the general proposition is later in date, the specific will be held to have been repealed; but if the specific is later in time, it will repeal so much of what is laid down by the general to the extent of inconsistency and the general proposition will retain its general character.

(*ii*) *The Absolute and the Qualified* (مطلق و مقید): Where there are two propositions, one absolute and the other qualified, and what is laid down by one of them is distinct from what is laid down by the other, effect should be given to both. If two texts relate to a single injunction of law with reference to the same facts, the one absolute in its terms will be read subject to the qualified text. For instance, it is laid down that in a certain event 'one must fast for sixty days', and it is also laid down with reference to the same event 'one must fast for sixty successive days. The inference is that the fasting must be for sixty successive days.

(*iii*) *The Proper and the Secondary* (حقیقی و مجازی): The words should be interpreted in their ordinary sense unless the content requires a secondary meaning. If a word is used in its dictionary sense (لغوی), it is regarded as proper in connection with such application and, if that word is used in another sense, it may convey conventional (عرفی), technical (اصطلاحی) or figurative

(استعارى) meaning. The tropical or secondary application of a word consists in its transference from its original to a connected sense. After such transference has taken place, it is the new meaning which prevails, and both the meanings cannot be assigned at one and the same time.

(iv) *Denotation and connotation*: A word conveys its meaning either by denoting the thing to which it is originally applied or that which it necessarily implies as a consequence of its application in the text. Such expression of meaning may be directly by the language of the text (عبارة ا لنص), or indirectly by way of connotation or suggestion (اشارة ا لنص). Sometimes a word may indicate something which its application in the text necessarily implies as a condition precedent (اقتضاء النص); sometimes from what is expressed in a text, it may appear that it applies to some other matter which comes within its intendment by the necessary implication of the language (دلالت النص).

The denotation means what is clearly and manifestly the subject matter of the text. Connotation means what is indicated by the words of the text without adding anything to it or taking into consideration the context thereof. For instance, the denotation of the verse:

للفقراء المها جرين الذين آخر جوا من ديارهم (الحشر: ٨)

For the destitute immigrants who were turned out of their houses (Q. ix : 8)

is the share of the immigrants into the property acquired in war. Its connotation is that the right of ownership of such persons over the property they left is lost, because the word destitute has been used which is applied only in respect of the persons who own nothing. This lays down the laws that the disbelievers become absolute owners of the properties of the Muslims which they capture in *Dār al-Ḥarb* (دار الحرب).

The instance of necessary implication (اقتضاء النص) is if a husband utters to his wife that she be spend her waiting period (اعتدی), this implies that he has divorced her because divorce is the precondition of waiting period.

The intendment of the text (دلالت النص) means the object of the legislator. This should be inferred literally and not by way of analogical deduction. For instance, it has been ordained in the Qur'ān regarding the parents;

لا تقل لهما آف ولا تنهر هما (بنی اسرائیل : ۱۷)

"Do not utter anything contemptuous to them, nor desert them" (Q. xv : 17)

If a person physically beats his father but does not utter any contemptuous words to him, he has still violated the verse by defeating the object of the legal provision contained therein.

The intendment of text is called in the Western legal terminology Mischief of Text (فحوی الخطاب). Paton summarises the discussion of 'Interpretation of Statutes' in the following words:

> "In the English Law there are three basic rules of interpretation. The first is the literal principle, the second is called the Golden Principle which means that ordinary meaning should be attached to the language of law unless it involves some difficulty or conflicts with the other provisions. The third principle is the Mischief Rule which emphasises the general policy of law."[1]

Doctrine of Repeal (نسخ)

Naskh (نسخ) literally means to delete. Legally it means repeal of a legal provision by another legal provision. Both the repealing and repealed laws must be revealed. By way of repeal alteration is made in the law by the Law Giver.

1: Paton: *A Text Book of Jurisprudence*, p. 217,

The instances of repeal are found in the previous *Shari'āhs* also. In the *Shari'āh* of Jacob two real sisters could be married together, but the *Shari'āh* of Moses repealed it.

The jurists differ among themselves about the scope and definition of repeal. Some jurists include specification (تخصيص) of general and qualification of absolute in the definition of repeal According to them the number of the repealed verses of the Qur'ān is sufficiently large. But the later jurists (متاخرين) restrict the definition of repeal to those verses whose legal effect has been totally abrogated. There are five verses in the Qur'ān, according to the research of Shah Walī-Allāh Dehlawī, whose legal effect has been totally repealed. The law which these versus enunciate has been repealed (منسوخ الحكم); so far as their recitation is concerned text has not been repealed (منسوخ القرأة).

The repeal may be of :

(*i*) One *Qur'ānic* text by another. In the verse,

كتب عليكم اذا حضر احدكم الموت ان ترك خيرن الوصية للوالدين والاقربين (البقره : ١٨٠)

"It is prescribed, when death approaches any of you, if he leave any goods, that he make bequest to parents and next of kin" (Q. II: 180).

It was laid down that one must make provision by will for his parents and other relatives But this was repealed by the verse,

يوصيكم الله في اولادكم (النساء : ١١)

"Allah directs you as regards you childern" (Q. IV: 11) wherein the parents and other relatives of a deceased are allotted shares in the inheritance as heirs:

(*ii*) a tradition by another tradition.

(*iii*) a tradition by a *Qur'ānic* text.

(*iv*) a *Qur'ānic* text by tradition. There is difference of opinion among the *Hanafī* and the *Shafi'ī* jurists regarding this kind of repeal.

The Orientalists

During the Middle Ages, it was commonly thought in Europe that Muhammad (peace be upon him) was not true in his claim that he used to receive Divine Revelation. Such a belief was the result of the Crusades propaganda which is being liquidated from the minds of the modern Europe. In the words of Montgomery Watt the Prophet of Islam was a pious person who used to sincerely believe that he was Divinely inspired.[1]

The Orientalists whether they are biased or not, unanimously hold that the Qur'ān is the creation of Muhammad's mind and he is the author of this book. According to them the Revelation was not an objective entity. It was a subjective state of mind created by his prolonged and keen observation of the surroundings and deep imagination. We critically appreciate this view in the following steps:

(*i*) If the Revelation was a subjective reaction to the unreasonable surroundings, the first revelation does not refute anything. It neither asserts unity of God (توحید) nor refutes Association (شرک). On the other hand its words are:

اقرأ باسم ربک الذی خلق (العلق ۹۶ : ۱)

"Proclaim in the name of your Lord who created."
(Q. XCVI : 1)

(*ii*) If this was an inner feeling, it should have been always compatible with the Prophet's (peace be upon him) ideas and actions. As a matter of fact it has sometimes differed with him. For instance, the Prophet decided to keep alive the captives of the battle of *Badr*, but the Qur'ān decreed:

1. Watt; *Bells' Introduction to the Qur'ān*, p. 17.

ما كان لنبى ان يكون له اسرىٰ حتىٰ يثخن فى الارض

(انفال : ٦٧)

It is not fitting for an Apostle that he should have prisoners of war until he has thoroughly subdued the land. (Q. VIII : 67)

(*iii*) If this was a reflection of his experience, feeling and imagination, it could not add to his knowledge. Whereas the Qur'ān says:

ما كنت تدرى ماالكتب ولاالايمان (شورىٰ ٤٢ : ٥٢)

You know not what was Revelation and what was Faith. (Q. XLII : 52)

(*iv*) Why it is so that its every fore-told turned out to be true !

(*v*) The Saudi Ambassador in Pakistan His Excellency Riyāḍh al-Khatīb analysed this point before me in this remarkable way:

"Those who say that the Qur'ān is the creation of Muḥammad's (peace be upon him) mind and thereby assert that he was not a Prophet, they will have to acknowledge that he was God; because only a person with supernatural power can create such a great difference between the style of the language spoken by him usually and the miraculous style of the Qur'ān."

An open challenge was thrown to the enemies of Islam to create even a few verses similar to the Qur'ān This challenge was never met by those who exhausted all means to crush the the Prophet (peace be upon him) and his religion. H. A. R. Gibb says:

"But the Meccans still demanded of him a miracle, and with remarkable boldness and self-confidence Mohammad appealed as the supreme confirmation of his mission to the *Korān* itself. Like all Arabs they were connoisseurs of language and rhetoric. Well then, if the *korān* were his own composition other men

could rival it. Let them produce ten verses like it (Q. XI: 13, Q. II: 23, Q. LII : 34). If they could not and it is obvious that they could not, then let them accept the *korān* as an outstanding evidential miracle."[1]

(*vi*) Some Orientalists have alleged that certain anecdote have been incorrectly recorded in the Qur'ān. According t them the Prophet (peace be upon him) heard those from th Christian or Jew scholars but commited mistakes (God forbid during the narration. For instance, Mary was the name c the sister of Moses as well as the mother of the Christ. Th former was the daughter of *'Imrān*. The Qur'ān has incorrectl claimed the latter as the daughter of *'Imrān*.[2]

Such a frivolous objections has been recorded in th standard Book like Britannica! Can't there be two persons wh are name sake? This objection would have got some weigh if the learned author had proved the name of Christ's grandfather different from what the Qur'ān has stated. Th Bible does not disclose the name of the Christ's grandfather. Ir the Britannica itself it has been admitted that no historica document of the first century records anything about the parents of Mary.[3]

It is only the Qur'ān which has for the first time authoritatively discribed the details about the early life of Mary. So much so that, now, the Christian scholars also quote the Qur'ān as authority.[4]

The main emphasis of the Orientalists is to criticise the compilation of the Qur'ān. They allege that the compilation in the present form is neither correct nor complete. A few of their arguments are reproduced with criticism.

(*i*) During the time of the Prophet (peace be upon him) it was not customary to record the *Qurānic* verses into

1. Gibb: *Mohammadanism*, p. 40-41.
2. Encychlopeadia Brittannica, v. 13, Article Qur'ān.
3. Encyclopaedia Britannica, v. 14, Article *Mary*.
4. Hastings, *Dictionary of the Bible*, v. 3. p. 288.

writing. It is just possible that some verses of the early period might have been lost.[1]

This argument is misconceived and factually incorrect. The compilation of the Qur'ān has been discussed in the preceding pages of this chapter.

(*ii*) It has been narrated in *Musnad Ahmed* that 'Abdullah bin Mus'ūd did not recognise the last two chapters—*Mu'awwizatain*, as part of the Qur'ān.[2]

This fact has not been correctly attributed to 'Abdullah bin Mas'ūd. All the renowned scholars unanimously refute this allegation. Some of them are Nawāwī, Ibn Hazm, Rāzī, Bāhr al-'Alūm and Suyūṭī.[3]

It seems that 'Abdullah bin Mus'ūd had not recorded *mu'awwizatain* in his *muṣhaf* just as he had not recorded the first chapter, *Sūrā fātiḥā*. This was just because it is very easy to commemorate these chapters by heart.[4]

(*iii*) There are traditions recorded in the authentic books that the legal provisions of stoning to death (رجم) and fosterage (رضاعت) were included in the Qur'ān but were omitted therefrom with the passage of time.[5]

There exists a serious fallacy in this argument. The complete text of the tradition is:

"Āishā reported in what was revealed (فیما انزل), ten attested sucklings were required to establish the ban of fosterage. The ten were later replaced by five. The Prophet (peace be upon him) died and the five were still being recited like the injunctions of the Qur'ān (فیما یقرء من القرآن)." The phrases (فیما آنزل من القرآن) and (فیما یقرء من القرآن) have been wrongly interpreted to

1. F. Buhl: *Encyclopaedia of Islam*, v. 3, Korān.
2. Watt: *Bell's Introduction to the Qurān*, p. 46.
3. Suyūtī: *Itqān* v. 2 p. 81.
4. Kauṯharī: *Maqālāt*, p. 16.
5. Encyclopaedia of Religion and Ethics, v. 10, p. 543.

signify that these legal provisions were part of the Qur'ān. It goes without saying that two kinds of legal provisions were communicated to the people by the Prophet (peace be upon him), one by his own authority (ان هوالا وحی یوحی) and the other what he received through Gabriel. The latter had further two kinds: the Qur'ān and the teachings other than the Qur'ān. This means that everything which the Prophet (peace be upon him) received through Gabriel was not the Qur'ān although it came through the same medium. This is what the narrator (راوی) means to say that the injunctions of *rajam* and *raḍḥa'* were understood and read to have received them through the same medium as that of the Qur'ān.[1]

1. Manāzīr Aḥsan Gīlānī; *Tadwīn Qurān*, p. 72.

4

The Sunnah

The discussion of the fourth question of Chapter II is now being taken up.

Sunnah, an Arabic word which literally means 'method' was applied by the Prophet (peace be upon him) as a legal term comprising what he said, did and agreed to. Its authority derives from the Prophethood of Muḥammad and various texts of the Qur'ān. The Prophet (peace be upon him) declared:

الا وانی اوتیت الکتاب و مثلہ معہ (ابوداؤد)

"Behold! I have been given the Book and a similar thing (Sannah) along with that."

Ḥadīs (traditions) is the reporting of the Sannah of the Prophet (peace be upon him), which is the second principal source of Islamic Legislation.

Wisdom in splitting the Revelation

God's object was not to give a system of abstract ideas, which could only be discussed and talked about. His object was to make the people practically obey His injunctions. This required concrete precedents to be laid down for every walk of human life. Iqbal says:

"But we must not forget that this system-building in

> the ancient world was the work of abstract thought which cannot go beyond the systematization of vague beliefs and traditions, and gives us no hold on the concrete situations of life—the first important point to note about the spirit of Muslim culture then, is that for the purposes of knowledge, it fixes its gaze on the concrete, the finite. It is further clear that the birth of the method of observation and experiment in Islam was not due to a compromise with Greek thought but to a long intellectual warfare with it."[1]

Only the abstract thought can be explained in a book. Concrete cases can be laid down only by a human being. Therefore, God entrusted this job to the Holy Prophet (peace be upon him).

لَقَدْ كَانَ لَكُمْ فِي رَسُولِ اللَّهِ أُسْوَةٌ حَسَنَةٌ (الاحزاب: ٢١)

"For you the life of Prophet has got model of behaviour."

This is why the Qur'ān was revealed peacemeal. The Qur'ānic verses alongwith the circumstances under which those were revealed and the practice of the Prophet (peace be upon him) thereon, constitute a body of concrete cases. The Prophet (peace be upon him) led his life and organised his society under the Divine Guidance. And, thus, succeeded in establishing behaviour patterns in every walk of human life, which are easily practicable and clearly communicable. In this context, Ralph Linton, after analysing different societies of the past and the present, has drawn the following significant inference:

> "The greatest difficulty which confronts a leader who seeks to develop a new society is that he has to start with persons who have already been trained to live in some other society. This training begins at birth, and by the time the individual is even half grown, he has acquired a mass of unconscious habits adapted to the society in which he has been reared. These habits can

1. 'Reconstruction of Religous thought in Islam', p. 126, 131.

be changed, as when an individual comes to live in a new society and is gradually incorporated into it, but it is almost impossible to change them unless the new society offers patterns of behaviour which the newcomer can learn directly and objectively. When the new society lacks such patterns each individual must stop and think each time before he acts. Moreover, what one individual decides to be proper, with relation to ideas and values of the new society may not agree with what another individual thinks is proper. The result is endless confusion and involuntary interference, and the people who are attempting to develop the new society soon fall back into their old habits. This tendency can be observed again and again in the history of religious sects. Such sects usually have a well-defined group of ideas and values in common and a strong *esprit de corps.* Lacking patterns for the expression of these in concrete predictable behaviour, they nearly always end by reverting to the behaviour patterns of the society from which the bluk of the converts have been drawn. These patterns may be reinterpreted and rationalized in terms of the new beliefs but the patterns themselves undergo only minor changes in the process.

The only cases in which new forms of society have been established successfully have been those in which the plan for the new society has included a large body of concrete rules of behaviour. Sects in which the founder and his immediate successors exercise autocratic control will acquire such a body of rules. Situations can be brought to the Prophet as they arise, and the behaviour which he prescribes in each case becomes a precedent for action in similar cases. Eventually the precedents become numerous enough to provide for ordinary exigencies of group living and converts can learn the new ways objectively and substitute them for the old."[1]

The above discussion shows that to reform a society successfully and to establish it on new patterns, three things are required:

(*i*) the behaviour patterns should be given in concrete

1. 'The Study of Man', p. 96.

form;

(*ii*) the fundamental and general ideas are not sufficient. Detailed rules should also be provided;

(*iii*) All the social behaviour should be perceptible by senses.

The Qur'ān as the first source and Sunnah of the Prophet (peace be upon him) as the second source fulfil these requirements

The author of the above extract, while writing the phrase, 'the Prophet and his immediate successors', undoubtely meant the Prophet of Islam and his four Caliphs. To have the immediate successors who had the ideal control over the society, is the distinctive feature of the prophethood of Muhammad (peace be upon him).

Shah Walī Allah writes:

> "The most prominent among the prophets is he, who, in addition to his being a prophet, has another quality. One object of God by sending a prophet is to bring the people from the darkness of heresy to the light of true belief. Another object is that his people are made the best nation and model for the rest of the people. This peculiarity has been bestowed on the holy Prophet (peace be upon him)."[1]

Two Revelations

Due to such a significant position of the Sunnah, Divine Revelation was not limited to the Qur'ān. The life of the Prophet (peace be upon him) which was essentially to be obeyed by the people was not left without Divine Guidance. The fact that the things other than the Qur'ān were revealed on the Holy Prophet (peace be upon him) is witnessed by the Qur'ān itself. For example:

(*a*) The Qur an was revealed peacemeal, and the arrangement and order of the verses and the *Sūrahs* was also

1. *Hujjāt-Allah al-Bāligha*, v. 1, p. 93.

directed by God. But these directions have not been mentioned in the Qur'ān.

(*b*) In *Sūrah Anfāl* it has been stated about the Battle of *Badr'* that God had promised that the Muslims would be made victorious over one out of the two groups.

إِذْ يَعِدُكُمُ اللَّهُ إِحْدَى الطَّائِفَتَيْنِ أَنَّهَا لَكُمْ ۔ (انفال : ٧)

"Behold! Allah promised you one of the two (enemy) parties that it should be yours." (Q. 9: 6)

One group was the caravan led by Abū Sufyān and the other was army of the Meccans. But the promise of God which has been referred to in this verse is not contained in the Qur'ānic verses.

(*c*) In *Surah Najm* where the Prophet's Celestial Journey (معراج) has been described, the Qur'ān says:

وَأَوْحَىٰ إِلَىٰ عَبْدِهِ مَا أَوْحَىٰ ۔ (النجم : ١٠)

"And was revealed to the Prophet (peace be upon him) what was revealed." (Q. 53: 9)

In this verse a certain revelation is referred to but it has not been described in the Qur'ān.

(*d*) The Qur'ān says about the Holy Prophet (peace be upon him):

وَمَا يَنطِقُ عَنِ الْهَوَىٰ إِنْ هُوَ إِلَّا وَحْيٌ يُوحَىٰ ۔ (النجم : ٣، ٤)

"And he does not speak (even) on his desire, all this is revealed in him."

Shafi'ī has written in *Al Risala* which is the first book on Islamic Jurisprudence, "The whole Sunnah of the Prophet (peace be upon him) was revealed on him. The word *Hikmat* used in the Qur'ān means the Sunnah, therefore, the Sunnah of the Prophet (peace be upon him) is revealed by God."[1]

2. *Al Risāla*, p. 28.

Abū Muḥammad Juwainī has distinguished between th two kinds of revelation :

> "God's Revelation is of two kinds. First in which God orders the Gabriel to take His message to the Prophet (peace upon him) that God says to do such and such thing in such and such manner. The Gabriel listens to the message, understands it, comes to the Prophet (peace be upon him) and gives the message. The direction is from God but in the language of Gabriel. For the sake of illustration it is like a king who sends a message to his officer to do something. The officer is given the message by the messenger in his own words and not in the words of the king. The second is in which God orders the Gabriel to go to the Prophet and read this before him. The Gabriel comes and reads word for word what God had said. The first kind of Revelation is the Sunnah and the second is the Qur'ān."[1]

Compilation of the Sunnah

Two misconceptions have been spread about the *Sunna* Firstly they were orally transmitted and were not recorde during the period of the Prophet (peace be upon him). Secondl the sense uttered by the Prophet (peace be upon him) cou change during the oral transmission.

The Companions of the Prophet (peace be upon hin used to take the Sunnah as binding authority and were ve anxious to learn it by heart for themselves and for the purpo of further transmission. Some of them used to write it als Abū Daūd and Dārimī have narrated from 'Abduallah b 'Amr bin al 'Ās :

> "Whatever I heard from the Prophet (peace be upon him) I used to write it to learn it by heart. Some persons from the Qureish objected to this and said that the Prophet (peace be upon him) was a man and sometimes he was talking in anger and sometimes he was happy. At this I stopped writing and also told this to the Pro-

1. Suyūṭī: *Al-Itqān*, v. 1, p. 44.

phet (peace be upon him). He ordered to continue writing and pointed with his figer towards his mouth and said after swearing in the name of God that nothing but the truth comes out of that."[1]

There are some traditions which narrate that the Prophet prohibited writing anything other than the Qur'ān. But every tradition should be read in its context. Khattābī has said :

"انما نهى ان يكتب الحديث مع القرآن فى صحيفة واحدة لئلا يختلط به و يشتبه على القارى"

"The Prophet only prohibited writing of the traditions alongwith the Qur'ān in the same document. The mixing up of the two could cause confusion to the reader."[2]

Dr. Hamid-Allah, after mentioning all the traditions of prohibition, writes :

"All these traditions mean that round about the year 7 A. H., the Prophet (peace be upon him) made some important speeches. Some newly converted Muslims had come from Yemen. Some of them were literate. Some *Surahs* of the Qur'ān were given to them to read and memorise. When they heard that speech of the Prophet (peace be upon him) some of them wrote it on the same papers on which the Qur'ān had been written. At this the Prophet (peace be upon him) prohibited to write anything from him other than the Qur'ān and ordered to cancel what had been so written".[3]

لا تكتبوا عنى غير القرآن و من كتب عنى غيرالقرآن فليمحه

"Don't write, from me anything except the Qur'ān, and he who has done so should erase that."

The traditions are the history of the Sunnah. These were being recorded during the life of the Prophet (peace by upon

1. *Muqaddimā Sahifā Hammām Bin Munabbih*, p. 9.
2. Jāmi' *Bayān al-Ilm*, v. 1, p. 71.
3. *Muqaddimā Ṣaḥifā Hammām bin Munabih* p. 9.

him) as shown below:

(*a*)

وَاذْكُرْنَ مَا يُتْلَىٰ فِي بُيُوتِكُنَّ مِنْ آيَاتِ اللَّهِ وَالْحِكْمَةِ ۔ (الاحزاب : ۳۳)

"And remember what is read in your houses of the Qur'ān and the Sunnah." (Q. 33: 33)

Somebody asked from Shafi'ī about the argument tha *Hikmā* which was revealed alongwith the Qur'ān, mean the Sunnah. He recited this verse.[1] And this verse furthe points out that in the house of the Prophet two things used t be read, the Qur'ān and the Sunnah. This indicates that th Prophet's wives used to write the Sunnah as well. Therefore the Qur'ān itself witneses to the early stage of the compilatio of the Sunnah during the Prophet's life (peace be upon him);

(*b*) Iban 'Abd al Bar says:

"كتب رسول الله صلى الله عليه وسلم كتاب الصدقات والديات وا الفرائض والسنن"

"The Prophet dictated a book on the law of taxation, monetary compensation, inheritance and general law. Its copies were given to the governors appointed outside Madina."[2]

(*c*) Ibn Hajar 'Asqlānī writes:

"The Prophet (peace be upon him) appointed 'Amr bin Hazm as the commissioner and the jurisconsult of Najrān, and dictated for him a book which contained the Law of Inheritance, the general law, law of taxation and monetary compensation."[3]

Zuhrī says that this book was written on leather. It was with the grandson of 'Amr bin Hazm.

2. Shafi'ī *Kitāb al-Umm*, v. 8, p. 251.
3. *Jāmi' Bayān al-'Ilm'*, v. 1, p. 71.
4. *'Al Isti'āb* v. 2, p. 437.

He took it from him and read it.[1] 'Amr bin Hazm collected twenty-one more dictations of the Prophet and compiled in one volume. Ibn Tulūm has made it the appendex of his book

I'lām al-Sā'ilīn 'An Kitāb Sayeā al-Mursalīn.

(اعلام السائلين عن كتاب سيد المرسلين)

'Umar bin 'Abdal-'Aziz required some documents of the Prophet on the 'Law of Taxation.' He got this book from the descendants of 'Amr bin Hazm.[2] Abū Da'ūd, Nasaī, Ibn Hibbān and Dārimī have narrated its parts relating to the Revenue and Criminal Laws. Ya'qūb bin Sufyān says:

كان الصحابه والتابعون يرجعون اليه ويدعون اراء هم

The Companions of the Prophet (peace be upon him) and their successors used to refer to it and review their judgments.

(*d*) Many books of traditions were compiled by the Companions of the Prophet (peace upon him). The remarkable ones are *Sahifā Sādiqā* by 'Abdullah bin 'Amr bin 'Āas, *Sahīfa Ali*, *Sahifā Abū Bakr*, Sahifā *Jābir*, Sahifā Samurā bin Jundab and Sahifā Ṣahiā by Ābū Hurairah."[4]

The traditions of these books have been narrated by famous traditionists like Bukharī, Abū Da'ūd, Hakim, Zaila'ī etc. in their collections. This is sufficient to remove the misconception that the work of compiling the traditions started one hundred years after the death of the Prophet (peace be upon him).

Abū Ḥurairah, a reputed authority on *Ḥadīs* said, "None is a better keeper and narrator of *Ḥadīs* than me except

1. *Al-Isti'āb* v. 2, p. 437.
2. *Dar Qutnī*, p. 210.
3. *Al Rauḍal-Bāsam*, v. 1, p. 34.
4. It has been recently edited and published by Dr. Hameed Allah with the title *Sahifa Hamman bin Munabbih.*

'Abd Allah bin 'Amr bin al-'Ās. That is because he used to write whatever he heard from the Prophet (peace be upon him.)[1]

Anas bin Mālik the devout servant who lived with the Prophet (peace be upon him) all through his stay in Madina, and who died in 93 H., said, "Every now and then I took down in notes interesting points from what the Prophet (peace be upon him) said in his discourses and other occasions of conversation; and I used to read these notes over to the Prophet (peace be upon him) whenever I found him having leisure, and after he had corrected them, I made a fair copy of them for my own record."[2]

In *Al-wṯhāiq al-Ṣiyāsia* Dr Ḥamīd Allah records 250 documents emanating from the Prophet and written down in his presence.

It is incorrect to say that the traditions were transmitted orally. Ahmad bin Ḥanbal says about 'Abd Allah bin Mubārak that he used to transmit traditions from the book.[3] There are persons who generally assume that the traditions were recorded for the first time by the compilers of the classical collections like Bukārī, Muslim, etc.[4] The reason for this assumption is the misunderstanding of the term *Ḥaddaṯhanā* (it was reported to us). Sprenger was the first orientalist who understood that this word usually did not mean an oral transmission, and in those days it was the practice to refer to authors instead of works.[5] If the teacher read to his students, then the students could use the word *Ḥaddaṯhanā* (حدثنا) whenever they transmitted that particular

1. Al-Bukhārī: *'Jāmi'*, *kitāb al-'Ilm.*

2. Hamīda-Allah: 'Early History of the compilation of the *Hadīs*' Article in Istamic Review, Voking, May, 1949.

3. Ibn Hajar: *Tahḍīb al-Tahḍīb* V. v. p. 348.

4. Justice Shafi of Lahore High Court, Pakistan Legal Dicisions 1960. Lhr. p. 1142.

5. Sprenger: J. A. S. B., 1850, p. 9.

tradition, but if the student read to his teacher then he used the term *Akhbaranā* (اخبرنا). However, this difference was not strictly observed.[1]

The *Muwaṭṭa'* of Mālik was given a title by the author himself, unlike most of the early books which did not have any titles save the nanes of their compliers. The compilers of the classical book utilized the material of the *Muwaṭṭa'* profusely referring to Mālik without mentioning the book. This, also, shows that traditions were transmitted, not orally, but through the books, yet referring to the author only. Thus, the late famous compliations of *Ḥadīs* were by no means the first written documents relating to the *Sunnāh.*

Authentication of the Sunnah

Each *Ḥadīs* is prefaced by a chain of narrators (*Sanad*) going back to the original narrator. The process is called *Isnād.* A specific science was built up, whereby not only the chains of authorities could be traced back to the Prophet (peace be upon him) himself but also the biographical data about all the narrators were investigated and classified. This special branch of study is called the science of invalidating and declaring reliable (علم الجرح والتعديل). Such an exacting science does not exist outside the Muslim world. Professor Gibb remarks about Bukhārī, "A work of immense interest and scrupulous scholarship."[2]

The *insād* system was used by the Arabs in Pre-Islamic period, in transmitting pre-Islamic poetry.[3] It was a common practice among the Companions to transmit the traditions of the Prophet (peace be upon him), when they saw each other. Some of then had made special arrangments to attend the Prophet's circle in shifts and to inform each other of

1. Qāsimī: *Qawā'id al-Taḥdīth*, p. 207,
2. Gibb, H.A.R., 'Mohammadansim', p. 66.
3. Naṣir al-Asad, *Maṣādir al-Shi'r al-Jāhilī*, p. 255.

what they had heard and seen in the court of the Prophet (peace be upon him). It is natural that one of them who had gained knowledge at second hand, while reporting the incident to a third man, must have disclosed his source of information and the full account of the incident. In the beginning scrutiny about the antecedents of the narrator was not essential but, later on, discrimination between trustworthy and untrustworthy narration became essential. Ibn Sīrīn (d. 110) says:

> "They did not ask about the *isnād*, but when civil war (between 'Alī and Mu'āwiyā') arose they said, 'Name to us your men."[1]

It is essential of *isnād* system that as we go further the number of transmitters increases. Sometimes, tradition transmitted by one Companion acquires ten students in the next generation of Successors (تابعون), and these ten students may have twenty or thirty students belonging to different countries and provinces. One tradition in this way may have two hundred or three hundred independent channels of transmission. It is impossble for all these persons to consult each other so as to give a similar form and sense in transmitting a particular tradition. If a particular tradition is transmitted by so many persons with a similar form and sense, its genuineness cannot be questioned, particularly when the trustworthiness of the narrators has been vouched for by their contemporaries. No other literature of the world could be able to prove its authenticity if the same standard is applied to it.

Every channel of tranmission (سند سلسلہ) is counted as a separate *Ḥadīs*. There have been some traditionists who claim that they had every *Ḥadīs* from one hundred channels.[2] There are at least fifty students of al-Zuhrī who made their written collections from him. If every one of them had

1. Muslim: *Ṣaḥīḥ*, v. 1 p. 15.
2. Kauṯharī: *Tā'nīb al-Khatīb*. p. 17.

written down only five hundred traditions from him, the number could have been 25,000. If every student of al-Zuhrī had further only two or three students, this number of traditions should increase at the end of the second century to about 75,000; and in the time of al-Bukhārī, they would have been in hundred of thousands. Al-Bukhārī claimed that he made his collection out of six hundred thousand. His book contains 7,397 *Ḥadīṣ* with repetition and 2,602 *Ḥadīs* without repetition.

This is selection out of vārious channels of transmission and not out of subjects (متن) of tradition. This thing has been puzzling for many scholars. Guillaume says:

> "Bukhārī selected his material from no less than 600,000 *Ḥadīs*. He reduced vast number of forgeries or dubious reports to less than 3,000 *Ḥadīs*. In other words, less than one in every 200 traditions which circulated in his day could pass his test."[1]

The similar idea is expressed by Ahmad Amīn in *Fajr al-Islām*, Muir in *Maḥomet*, Robson in *Tradition in Islam*, Nicholson in *A Literary History of the Arabs*, Gibb in *Mohammadanism* and Haikal in *Hayāt Muḥammad*.

Classification of Ḥadiṣ

There are three methods whereby a report is believed or disbelieved.

(*i*) *Manner of Transmission.*

If the claim of transmission is continuous till the original authority the tradition is called *muttaṣil* (متصل); and if the chain is broken it is called *munqaṭī'* (منقطع). If the subject matter (متن) of the tradition is continuously attributed to the Prophet (peace be upon him), it is *musnad* (مسند); but if the subject is attributed to the Prophet (peace be upon him) irrespective of the fact whether the chain is continuous or broken, it is *'marfū'* (مرفوع). The tradition which is attributed to the Companions (صحابہ)

1. Guillaume, *Islam*, p. 91.

without reference of the Prophet (peace be upon him), whether it is continuous or broken, it is *mauqūf* (موقوف); and which is attributed to the successor (تابعی) only is called *maqṭū'* (مقطوع). Shafi'ī and Ṭabarānī, sometimes apply the word *maqtu'* to *munqaṭi'* tradition. In case a successor attributes a tradition to the Prophet (peace be upon him) directly without quoting the link of some Companion, it is *mursal* (مرسل). A Companion who was minor in the time of the Prophet (peace be upon him) is also considered to be successor in this regard.

The *mursal* tradition is in the nature of hearsay and is considered to be a weak tradition. Goldziher has wrongly said that all the traditions are hearsay. The evidence of a sessions trial when considered by the High Court at the appellate stage is not hearsay. The statements of the eye-witnesses recorded by a Sessions Judge and transmitted to High Court through trustworthy media does not render the evidence hearsay. Similarly the *Sunnah* directly watched by the Companions and transmitted through trustworthy channels is not hearsay.

The tradition which is transmitted by numerous channels in every age and of different places receives universal publicity and acceptance. It is called universal (متواتر). Its genuineness does not depend upon the reliability of the narrators. Traditions of this class, like a verse of the Qur'ān, ensure definite authenticity and demand implicit belief as well as action (فرض). The class of traditions which are narrated by a few channels are non-universal or *ahād* (احاد). When a tradition of non-universal character is corroborated by various channels (تعدد طرق) which are continuous and the narrators are trustworthy (ثقہ), it is legally regarded at par with the universal traditions and equally carries conviction of its genuineness into a person's mind.[1] It demands obligatory action and not belief (واجب).

Usually the very words (روایت باللفظ) are narrated, but sometimes only the sense and substance (روایت بالمعنی) is reported. In

1. Ashraf 'Ali Thānwī; *al-Intibāhāt* (with commentary) vol. v. 2 p. 122.

the later case the true sense is crystallised by corroboration; just as it happens in the case of witnesses who depose in their own words in a court of law.

(ii) Qualification of Narrators.

A trustworthy (ثقہ) narrator (راوی) must have understanding. The report of an infant or a lunatic cannot be accepted. He must possess the power of retention (ضبط) which implies that he should have properly heard the words of the speaker, is capable to understand their meaning, should be able to retain them in memory, and is capable to reproduce with accuracy at the time of narration. Lastly, he must be a Muslim of righteous conduct (عدالت), which signifies that he generally follows the injunctions of religion and reason.

A tradition reported by a continuous chain of such narrators is called valid or *Ṣaḥiḥ* (صحیح). If some of the narrators are short of any of these qualifications, the tradition is weak or *ḍha'īf* (ضعیف). When the qualifications of a narrator are unknown, it is *majhūl* (مجہول). The tradition which is found to be fabricated is called *mauḍhū'* (موضوع). The weakness of a tradition may be strengthened by the process of corroboration.

A trustworthy narrator of traditions may be possessed of legal learning and acumen. In other words he may be a jurist also. In the field of legal traditions, the narration (روایت) of a trustworthy and jurist reporter is given preference to that of a trustworthy reporter but not jurist.

(iii) Inherent quality of the subject matter.

Certain infirmative circumstances may cause a tradition to be unreliable. The text of the tradition may be self contradictory (مضطرب المتن). The tradition may be contradictory to a text of the Qur'ān or text of a tradition narrated through sounder channel. Such a tradition is called *shādh* (شاذ).

The Orientalists

The first Orientalist who made a significant attempt in the subject of *Ḥadīs* is Ignas Goldziher. He published his research

Muhammedanische Studien in 1890. This book has been the basic source for the study of *Ḥadīs* in the Wast. *The Traditions of Islam* by A. Guillaume draws mostly on Goldziher's work. Margoliouth also follows the suit. Joseph Schacht has investigated the legal traditions particularly in his book *The Origins of Muhammadan Jurisprudence*. He has tried to make advancement in the research but on the same pattern even after three quarters of a century after Goldziher. If Goldziher were alive he would have certainly modified his theories in the light of the discovery of the valuable manuscripts and documents of the first and second century of the *Hijrah*. Professor Robson has contributed valuable articles in which he has modified some ideas of the Orientalists, but he is, on the whole, unable to come out of the influence of Schacht. In the following pages we shall analyse the ideas of Schacht.

We shall first ot all reproduce relevant portions from his works, *The Origins of Muhammadan Jurisprudence*, *An Introduction to Islamic Low*, etc., to enunciate Schachts' theories about the authenticity of Ḥadīs.

> "Mohammadan Law did not derive directly from the Qur'ān but developed, as we saw, out of popular and administrative practices under the Umayyāds, and the practice often diverged from the intentions and even the explicit wording of the Qur'ān....But the present chapter will show that apart from the most elementary rules, norms derived from the Qur'ān were introduced into 'Mohammadan Law' almost invariably at a secondary stage."[1]

> "The Prophet in Madinah became a Prophet-Lawgiver....his authority was not legal but, for the believers, religious and, for the luke warm, political."[2]

> "The Caliphs (632-61) were the political leaders of the Islamic community....but they do not seem to have acted as its supreme arbitrators.... the caliphs acted

1. *The Origins of Muhammadan Jurisprudence*, p. 122.
2. *An Introduction to Islamic Law*, p. 11.

to a great extent as the law givers of the community."[1]

"The first caliphs did not appoint *kāḍīs*....The Umayyads took the important step of appointing Islamic judges or *kāḍīs*....From the turn of the century onwards (C. 715-20) appointments of *kāḍīs* as a rule went to 'specialists'....the specialists from whom the *kāḍīs* came increasingly to be recruited were found among those pious persons whose interest in religion caused them to elaborate, by individual reasoning, an Islamic way of life....As the groups of pious specialists grew in numbers and in cohesion, they developed in the first few decades of the second century of Islam, into the ancient schools of law."[2]

"The ancient schools of law shared the essentials of legal theory.... The central idea of this theory was that of the 'living tradition of the school' as represented by the constant doctrine of its authoritative representatives....It presents itself under two aspects, retrospective and synchronous. Retrospectively it appears as *Sunnah,* the idealized practice, together with the need to create some kind of theoretical justification for what so far had been an instinctive reliance on the opinions of the majority, led, from the first decades of the seconed century onwards, to the living tradition being projected backwards and to its being ascribed to some of the great figures of the past. The Kūfians were the first in attributing the doctrine of their school to Ibrāhīm al-Nakha'ī....The Medinese followed suit."[3]

"The process of going backwards for a theoretical foundation of Islamic religious law did not stop at these relatively late authorities, but was taken back to and directly connected with the very beginnings of Islam in Kūfa, beginnings associated with Ibn Mas'ūd.[1]

"The movement of the traditionists in the second century of the *Hijrah,* was the natural outcome and

1. *An Introduction to Islamic Law,* p. 15.
2. *Ibid,* pp. 26, 28, 29, 30.
3. *An Introduction to Islamic Law,* p. 31.

continuation of a movement religiously and ethically inspired opposition to the ancient schools of law. The main thesis of the traditionists was the formal 'traditions' deriving from the Prophet superseded the living tradition of the school. The traditionists produced detailed statements or 'traditions' which claimed to be the reports of ear- or eye-witnesses on the words or acts of the Prophet, handed down orally by an uninter-rupted chain (*Isnād*) of trustworthy persons. Hardly any of these traditions as far as matters of religious law are concerned, can be considered authentic. All the ancient schools of law offered strong resistance to the disturbing element represented by the traditions which claimed to go back to the Prophet.[1] And traditions from the Prophet had to overcome a strong opposition on the part of the ancient schools of law."[2]

"It is safe to assume that Muhammadan law hardly existed in the time of the historical Sha'bī."[3]

Critical Appreciation:

(*i*) Schacht's conception of nature of the law in Islam is fundamentally wrong. His contention that the Islamic law did not derive from the Qur'ān is baseless. It seems that he did not go through the Qur'ān. The Qur'ān is full of legal potentials. There are voluminous commentaries of the Qur'ān like Jaṣṣāṣ Rāzī's *Aḥkām al-Qur'ān* and Abu Bakr ibn al-'Arabī's *Akḥām al-Qur'ān*, which have been written exclusively from the legal viewpoint.

(*ii*) His view about the function of the Prophet (peace be upon him) as a legislator is incorrect. To say that the Prophet (peace be upon him) in Madīnah became a 'prophet law-giver' and simultaneously claim that his authority was not legal is a misleading and confused statement. The Qur'ān clearly pro-

1. *An Introduction to Islamic Law*, p. 35.
2. *The Origins of Muhammadan Jurisprudance*, p. 57.
3. *Ibid*, p. 230, footnote 1.

vides the legislative authority of the Prophet[1] (peace be upon him). 'The Constitution of Madīnah gives him the supreme authority in all the disputes and his decision was the final.[2] He has the highest judicial authority according to the Qur'ān.[3] Law in Islam has a divine origin. All the community was and is bound to judge according to the law revealed by God, otherwise they would no longer remain Muslims.[4] The Prophet (peace be upon him) as well as the caliphs promulgated law and administered justice according to the Divine Commandments. The Prophet (peace be upon him) sent the Companions as *kaḍīs* to various places. The governors of the provinces were directed to administer affairs according to Divine Ordinances. The details about the *kaḍīs* appointed by the Righteous Caliphs can be available from the History. Caliph 'Uthmān built a separate building for the court of justice with the name *Dāral-Qaḍā*.[5] Therefore, Schacht's view that the Prophet's authority was not legal and the first Caliphs did not appoint *Qadīs* is contrary to facts.

(*iii*) According to him 'living tradition of the ancient schools of law' symbolized certain ideas. These ideas had been occupying the place which was vacated by them, in the post Shāfi'ī period, for the *sunnah* of the Prophet (peace be upon him). The most important of these ideas are the practice (عمل) of some jurists or the consensus of the jurists on certain points (الامر المجمع عليه). The living tradition of the respective school of law was projected back and attributed to the Companions and their successors in the form of their opinions. This practice prevailed upto two centuries before shāfi'ī. These opinions of the Companions and the successors were further projected

1. Q. vii, : 157, lix : 7.
2. Hamīd Allah: *Al-Wathā'iq al-Siyāsīyā*, p. 20.
3. Q. iv : 61, 65, 105; xxiv: 51; xlii : 15.
4. Q. v : 44-49.
5. Al-Kattānī, *al-Tarātīb al-Idārīyah*, v, 1 p. 272.

back and attributed to the Prophet (peace be upon him) and thus the *Ḥadīs* was concocted and fabricated. In his view, up to Shāfi'ī the traditions were quoted in exceptional cases. Shāfi'ī formulated these exceptional cases into an incumbent rule. The sum and substance of his theories is that during the first century *Hijrah*, the Islamic Law remained divorced from religion. It was related with religion deliberately in the second century *Hijrah*. He maintains that the law was outside the scope of the Prophet's mission. His object was not to give a legal system to the world but he simply wanted to reform the morals of the people.

The above-mentioned views of Schacht create a vacuum of one hundred years in the history of Islamic Law. A historian cannot accept this vacuum. He, himself, is conscious of this and has tried to fill in with his concept of 'living tradition'. But this cannot fulfil such a huge vacuum. He is unable to explain the basis of the 'living tradition'. The Qur'ān cannot be the basis, otherwise the history of Islamic Law will have to be acknowledged from the period of the Qur'ānic Revelations. The *Sunnah* cannot be the basis because it was concocted, according to Schacht, afterwards. The opinions of the Companions and their successors, also cannot be the basis because, although they are prior to the traditions, yet he does not consider them to be so old that they may form the basis of Islamic Law. They too, according to him have been concocted.

It appears from his writings that he considers the customs of the pre-Islamic pagan Arabs as the 'living traditions.' With these customs he tries to cover the gap of those hundred years which form the most revolutionary period of the world. Such social institutions came into being which were never heard of before. In spite of this Schacht wants to make us believe that the institution of law remained paralysed during all this time. All its requirements were provided by the custom and usages of the pre-Islamic Arabs. After one hundred years, all of a sudden, a revolution came in the sphere of Law. For one

hundred years, there could not be any movement in the legal field, after that it pervades all the aspects of life. It is everywhere. Islam becomes distinguished due to its law. The Qur'ān is often quoted to solve the legal problems. The collections of the traditions are compiled. It is discovered after the pre-Islamic customs have become dysfunctional and are unable to meet the requirements of the society. Schacht is unable to solve this paradox. This sudden and revolutionary change after hundred years is inexplicable by any jurist, historian or sociologist.

Schacht does not answer the question that if the first one hundred years were empty from the existence of the traditions, what was the incentive for concocting the traditions? The concocted traditions are a very strong proof of the fact that the people have been throughout accepting the *Sunnah* of the Prophet (peace be upon him) as the source of law and authority for their legal and religious affairs.

He does not give any reason as to why the people started accepting the traditions as authority after hundred years? What were the new circumstances which created this attitude among the people? This is not at all an answer, what to talk of a satisfactory answer, that all this was done by Shāfi'ī. Was Shafi'ī an advocate of this attitude or a founder of this belief? If he is the advocate, where are the roots of this attitude? How and when it came into existence? If he is the founder, what circumstances pressed him to declare the essential character of this belief? If he founded it for the first time, what was the historical necessity which made his contemporary and the later jurists to accept this principle?

These unanswerable riddles rendered the views of Schacht ridiculous and full of fallacies. To prove that the Qur'ān is not the source of Islamic Law and that all the traditions have been concocted, from merely that the Qur'ān authenticated some of the pre-Islamic usages which according to Shah Wali-Allah are the reminiscence of the uncorrupted '*Ibrahīmī Shari'ah*', or that

at some occasion a jurist did not support his opinion with some traditions, or that the word 'Sunnah' covered also the meanings other than the *Sunnah* of the Prophet (peace be upon him), is just making mountain out of a mole hill.

All the arguments of Joseph Schacht are either based on very weak foundations of reasons or on unauthentic anecdotes of Islamic History. His views are so extremist and unrealistic that they have not been acceptable even to some scholars of Europe. S. D. Goitein in his article 'The Birth-Hour of Muslim Law'[1] has established that the Prophet of Islam (peace be upon him) gave the law based on Divine Revelation. Islamic Law is not the product of the post-Qur'ānic period. Its concepts were formulated by the Prophet (peace be upon him) himself. It was, during his lifetime, prohibited to decide the cases according to the pre-Islamic customs and habits.

Goitein is fortified by Gibb also:

> "The characteristic religious activity of the first century was the collection and transmission of details about the life and actions of Mohammad . . . . in view of the profound impress which the personality of the Prophet had left on his adherents, this activity was a spontaneous growth, owing nothing to outside influences. The natural centre of these studies was Medina, where most of the Companions continued to live and where first-hand information was most securely to be found."[2]

No doubt, a seemingly easy instrument for playing on religious sentiments as well as for destroying the frame work of Islam was the *Sunnah*. Deliberate forgeries were instituted and many false sayings (موضوعات) were ascribed to the Prophet (peace be upon him). The counterbalance against such forgeries was two fold; recorded compilation of the *Sunnah* and the authentication of the *Sunnah*

1. Goitein, S. D.; M. W. 1 (1960) pp. 23-29.
2. H. A. R. Gibb, *Mohammadanism*, pp. 61-62.

(*iv*) Schacht makes a clear statement that in the life of Sha'bī, the Islamic law did not exist. Sha'bī died in 110 H. and Abū Hanīfah died in 150 H. There remain forty years for the following activities:

1. Birth of the ancient schools of law.
2. Growth of the schools and ideas of consensus.
3. Projecting back of ideas, for example, by 'Iraqians, to the higher authority Al-Nakha'ī.
4. Further projecting to an older authority than Al-Nakha'ī such as Masrūq.
5. Further projecting to the oldest authority such as Ibn Mas'ūd.
6. Projecting back to the Prophet (peace be upon him) as a last resort.
7. Birth of opposition group, (traditionists).
8. Their fabrication of *Hadīs* with full details of the life and decisions of the Prophet (peace be upon him) as well as the Companions.
9. The opposition's fight with the ancient schools, and the loss of ground by ancient schools and the establishment of the overruling authority of the *Sunnah*.

A mere forty years for all these activities is inconceivable, and thus the theory of living traditions.[1]

(*v*) Schacht says :

> "The best way of proving that a tradition did not exist at a certain time is to show that it was not used as a legal argument in a discussion which would have made reference to it imperative, if it had existed"[2]

The above assertion is self-contradictory. On the one hand he says that two generations before Shāfi'ī, reference to the traditions was the exception.[3] And all the ancient schools of

1. M. M. 'Azmī : *Studies in Early Ḥadīs Literature*, p. 253.
2. *The Origins of Muhammadan Jurisprudence*, p. 140.
3. *Ibid*, 3.

law offered strong resistance to the traditions of the Prophet[1] (peace be upon him). In view of these statements there could be nothing to make reference to the traditions imperative even if those existed.

Furthermore, if a tradition is not quoted by a certain scholar, how does it prove that it did not exist ? It is quite natural that a jurist or a judge whenever he gave his verdict, was not bound to give the full documents to support his verdict.

While projecting back their own rulings in the form of *Isnād* if the Muslim jurists were so unscrupulous why did not all of them choose the most respected personalities and put their traditions in their mouths, and link them with the most reliable *Isnād*? Why did they choose the weak and denounced personalities also?

(*vi*) It is incorrect to suggest that the ancient schools of law were independent of the traditions. In fact all the schools of law used to develop their rulings essentially on the Qur'ān and the traditions. Ṣubhī Mahmasānī writes about Abū Hanīfah:

> "Abū Hanīfah was very careful regarding the choice of the traditions. He accepted only those traditions which are narrated through reliable chains. In spite of this his companions and his students have narrated fifteen *Masānīd* from him. The Chief *Qaḍī* Abu al-Mu'ayyad Khawārzamī has compiled all of them in one volume. For this reason we reject what Ibn Khaldūn and some others have stated that only saventeen traditions have been narrated by Abū Hanīfa."[2]

Abū Yūsuf tells the procedure of the committee of the jurists headed by Abū Hanīfah :

> "On every topic he used to first discuss the relevant traditions and precedents of Companions of the Pro-

1. *The Origins of Muhammadan Jurisprudence*, p. 47.

2. *The Philosophy of Islamic Jurisprudence*, p. 43 [Ibn Khaldūn has not recorded the fiction of Abū Hanīfah's seventeen traditions as his own view. He has stated it to be the version of some unknown person (الله).]

phet (peace be upon him)".[1]

Muhammad him Yūsuf Ṣālihī has written in *'Uqād al-Jam'ān* that Abū Hanīfah was also one of the great traditionists. If he had not concentrated on the traditions he would have not been able to derive the provisions of law. *Kitāb al-Kharāj* of Abū Yūsuf and *Kitāb al-Siyar* of Shaibānī are the living testimony that the Ḥanafites base their reasoning by analogy (قیاس) on the traditions.

The Caliph Mansūr once wrote to Abū Hanīfah that he gave preference to analogy over the traditions! He replied, "What has been reported to you about me is incorrect. I take, first of all, the Qur'ān, then the *Sunnah* of the Prophet, then the opinions of Abū Bakr, 'Umar, 'Uthmān, 'Alī, and then the opinions of other Companions. But when there is difference among the Companions I resort to analogy."[2]

(*vii*) The standard of Professor Schacht's research is very poor. He selects statements from the polemic writings of the jurists, and generalizes an isolated reference into a theory. He just ignores chain of references which contradict his generalizations without offering any explanation for that. He uses the phrase 'common occurrence',[3] basing his research on a few examples that suit his theory; and if there are cases that cover ninety per cent of the subject that refute his theory, he uses the phrase 'occasionally'.[4] Moreover, his reasoning is also unsonnd. If we find a scholar like al-Zuhrī who is sometimes the only narrator from one source or more, there is no reason to suspect him till we have some positive ground for it, particularly when his trustworthiness is established. Schacht suspected him, even charged him with forgery, on the basis that he transmitted a tradition alone and no other source

1. Kaūtharī : *Ta'nīb*, p. 152
2. Sha'rānī : *Kitāb al-Mīzān*, v. 1 p. 62.
3. *The Origins of Muhammadan Jurisprudence*, p. 172.
4. *Ibid.*, p. 28.

for the tradition is available.

To establish his theory of 'projecting back' of *isnāds*, he picks out a few faulty cases out of the thousands of traditions transmitted by Mālik. He points out Malik's mistakes referring to Zurqānī's commentary on the *Muwaṭṭā'*.[1] But he does not quote the complete paragraph. The reason is that Zurqāni has also pointed out that Malik's student Shafi'ī checked that fault.[2] The scholars, comparing Mālik's narration with several of his colleagues, found him faulty. Thus, the mistake was checked.[3] It cannot be denied that scholars commit mistakes, but it does not prove that mistakes are common, deliberate and cannot be checked If it were a common practice to attach *isnāds* to forged *Aḥādīs* it would have been impossible to detect and remove the discrepancy.

Legislative Functions of the Sunnah

The whole superstrucrure of *Sunnah* is based on the verses of the Qur'ān revealed gradually during a period of 23 years. Thus both the Qur'ān and the *Sunnah* constitute one complete whole. Both are fundamentally interdependent. This is like one organic body constituted by different parts. Together they make a living organism but divided they mean death. In the words of the Qur'ān the relationship of the Qur'ān and the *Sunnah* is that of a book and the light.

قَدْ جَآءَكُمْ مِّنَ اللّٰهِ نُوْرٌ وَّكِتَابٌ مُّبِيْنٌ۔ (المائدہ : ۱۵)

"And came to you from God, the light (Prophet) and the Book." (Q. 5 : 15)

In the absence of light the existence of a book or its non-existence does not make any difference. The book cannot be

1. *The Origins of Muhammadan Jurisprudence* p. 263.
2. *Zurqānī : Commentary on Muwaṭṭā'*, v. 1, p. 70.
3. *Suyūṭī: Tanwīr al-Ḥawālik*, v. 1, p. 44.

read in the darkness. Similarly light cannot be beneficial unless it is utilised for some purpose. Light or no light does not make any difference to sleeping person. The light of the *Sunnah* is useful and essential for reading the book of God—The Qur'ān.

When we say that there are two basic sources of Islamic Law, it is for the sake of description and explanation. As a matter of fact there is only one source, that is, Revelation as applied and exercised in the society set up by the Prophet (peace be upon him) and his Companions. Islam is the organic whole with the Qur'ān and the *Sunnah* as its constituents. Islam is the tree with the Qur'ān and the *Sunnah* as its roots and the Islamic Law as its fruit. When a scientist says that a certain machinery made for certain purpose comprises of these parts he does it to describe and explain the details of that machinery. He does not mean that each part can independently perform the function for which that machinery is made. The jurist, by saying that the Qur'ān and the *Sunnah* are the basic sources, only tends to describe the details of the Islamic legal system. For the purpose of laying down the law, both are interdependent and work together. The Qur'ān says,

وَأَنْزَلْنَا إِلَيْكَ الذِّكْرَ لِتُبَيِّنَ لِلنَّاسِ مَا نُزِّلَ إِلَيْهِمْ - (النحل: ٤٣)

"And we revealed the Qur'ān on you so that you may explain to the people what is gradually revealed for them." (Q. 16 : 43)

Ahmed bin Ḥanbal has said:

"God guided the Holy Prophet (peace be upon him) and sent him with the religion so that he may make it dominant over all the other religions. That book was revealed to him which is guidance for those who want to practise it. God has given the right to His Prophet (peace be upon him) to tell the people

the manifest and the latent meanings of the Qur'ān, its general and its specific, its repealing and the repealed injunctions etc."[1]

The following instances will illustrate how these two parts of the machinery of Islam interplay and function for the purpose of legislation. It will be seen that this function observes strict harmony and follows systematic rules. These rules were discovered by the jurists and called the rules of interpretation and secondary sources of Islamic Law. The discovery of these rules made it convenient and expedient to derive and codify the laws from the system of Islam.

(*i*) The meaning of the Qur'ān is general, the *Sunnah* makes it specific and particular. The Qur'ān says:

"And his parents each receive one sixth of what he has left, if he has children, but if he has no children and his heirs are his parents, then his mother receives a third: if, however, he has brothers his mother receives a sixth." (IV : 12).

"And half of what your wives leave belongs to you if they have no children; but if they have children, a fourth of what they leave belongs to you." (IV : 13)

Thus God made it plain that father and wives are among those He named in various circumstances, the terms are general; but the *Sunnah* of the Prophet (peace be upon him) indicated that it is intended to mean only some fathers and wives, excluding others, provided that the religion of father, children and wives is the same (*i.e.* Islam), and that each heir is neither a killer nor a slave.

And the Qur'ān says:

"After any bequests he may have made or debts (have been paid) (IV : 15)

The Prophet (peace be upon him) specified that the bequests must not exceed one-third of the deceased's

1. *Tabaqāt al-Ḥanābalah* p. 325.

estate, and the heirs receive the two-thirds; and he also made it clear that debts take precedence over bequests and inheritance and that neither the bequests nor the inheritance should be distributed until the creditors are first paid. The instance illustrates the principle of general (العام) and specific (الخاص).

(*ii*) The *Sunnah* may add and supplement the legal provisions of the Qur'ān. A marriage is unlawful if a man marries his wife's sister because the Qur'ān prohibited the taking of two sisters as wives; or if a man takes fifth woman, because the Qur'ān permitted four at a time and the Prophet (peace be upon him) made it clear that God prohibited the taking of any additional one. If one marries one's wife's aunt, paternal or maternal, this is prohibited by the Prophet. Marrying a woman during her *iddat* is also prohibited by the Prophet.

(*iii*) The Qur'ānic injunction is sometimes implicit (مبهم) and the *Sunnah* makes it explicit (مفصل) by providing essential ingredients and its details.

All women are prohibited to men except in one of the two ways—*Nikah* or *Waṭī* (intercourse with a captive) by virtue of possession. These are the two ways made lawful by the Qur'ān. But the Qur'ān is silent about how to solemnise a valid marriage. The Prophet (peace be upon him) laid down in the *Sunnah* the modes in which the *Nikah* makes a previously forbidden woman lawful, such as the need for a guardian, the testimony of witnesses, the consent of the spouses and the dower.

(*iv*) The absolute (مطلق) declarations of the Qur'ān are qualified (مقيد) by the *Sunnah*.

The Qur'ān says that the hands of male thief as well as the female thief are to be cut. The Prophet qualified this injunction with the condition like the convict

should not be lunatic, should not be a child, the punishment should not be inflicted in the cases of trifles, the punishment should be suspended during war and the stealing of food is not punishable;

(*v*) The *Sunnah* makes certain exceptions to the general rules made by the Qur'ān.

The Qur'ān made a general declaration that one may bequeath his property by will in the manner he likes. The *Sun ah* has created the exception in the rule that one cannot make a will in favour of one's legal heirs.

(*vi*) The gradation in the provisions of obligations and prohibitions (five values) is possible for a jurist only if he has in mind the complete whole of the Qur'ān and the *Sunnāh*, the context of every injunction and the situation in which the orders were made. Every order of the Qur'ān is not obligatory (واجب). For instance, God has said, "And marry from amongst the women, two or three or four". But polygyny is not obligatory. Similarly every act and order of the Prophet is not obligatory. There is a gradation. The jurists have classified the injunctions of the *Shari'ah* on the side of obligations as obligatory (واجب), desirable (مستحب) and permissive (مباح) and on the side of the prohibitions as prohibited (حرام) and undesirable (امکروه).

An insight in the *Sunnah* makes a person capable to discover this hierarchy. The Prophet (peace be upon him) lived a life. His personal practice or his reaction to the practice of his Companions gives an injunction its proper place in the hierachy. The manner of the Prophet's behaviour and the way of his expression is the only standard to place a certain provision on the scale of gradation. We cannot ourselves classify that these acts are in his personal capacity and others are in his capacity as a Prophet. Only he has got the authority to explain that such and such act is obligatory, such and such is simply an

etiquette and the other is his personal liking. There are no two capacities of his personality. He has only one capacity for us, and that is that of the Prophet, the messanger of God (peace be upon him). His Companions used to presume his every act and direction to be binding unless he himself told that the same was not binding and was only a suggestion. The famous tradition of pollination (تأبیر نخل) witnesses that when the Prophet objected to their act of pollination, they stopped it and refrained from doing so till he himslf told them that it was not a binding direction and that they might continue doing so. Similarly at the occasion of the battle of Badr, Ḥubāb bin Munzir had a suggestion in mind about the fixation of the tent. But before giving his suggestion he enquired from the Prophet whether his decision about the fixation of the tent was under Revelation. The general presumption was that his every act is taken to be in the capacity of the Prophet unless he himself specified a certain act to be his personal liking, a matter of simple etiquette or a peculiarity with him. The acts done by him are all in the capacity of the Prophet and are graded according to the degree of emphasis put by him.

Comparison with the British System

The sum and substance of the whole discussion of the primary sources is that the reservoir of Islamic Law is the 'Social System' established by the Qur'ān and the *Sunnāh*. The situations arose before the Prophet and his Companions. The Prophet provided the solutions in the light of Revelation, both direct and indirect, *i.e.*, Qur'ān and *Sunnāh*. These concrete precedents which were provided during the twenty-three lunar years in every walk of life, became numerous enough to give a complete 'Social System' in the objective form of behaviour. This social system is the source of Islamic Law. When we say that there are two primary sources of Islamic Law, we mean that the social system from which we get the Islamic Law is primarily constituted by the Qur'ān and the *Sunnāh* and for the

sake of description we discuss the both separately. The wisdom in giving the law in the form of comprehensive and self-sufficient social system is two-fold. Firstly, to make it objective and perceivable so that the society might be reformed and changed successfully. Secondly, unless the law is given through a social system, it could not be universal and eternal. This aspect that how the Islamic Law becomes practicable for all the times and places will be discussed later. The characteristics of the Islamic Law that it is based on a social system is somewhat comparable with the British System of Law. Professor Fitzgerald agrees with us on this point in the following words:

> "The paths or the practices of the Prophet himself are the most clear sources of information of the Law of God, and they may be compared in similarity with the recorded Common Law in the decisions of the year books and reports in the elarly history of the English Law."[1]

The difference is that the British have only that record of their old society which became the subject of legal disputes and was recorded by the judges as the Common Law. The Muslims have got with them the complete record of their original society. The other difference is that the old British society was not established under the Divine Guidance. As such, there is no justification to make the Common Law precedents binding on the future generations. Contrary to that the social system of Islam possesses the sanctity of being revealed and is justified in its binding nature for the coming generations. It is not imposed by the ancestors as it is in the case of the British system, but it is given by God.

1. Fitzgerald: *Muhammadan Law*, p. 90.

5

The Dependent Sources

The Qur'ān and the *Sunnah* are the primary and independent sources of Islamic Law. They are two forms of Divine Revelation. *Ijmā'* and *Ijtehād* which includes *Qiyās*, are the Secondary and dependent sources. They derive their value from the Qur'ān and the *Sunnah*. This is why they are called the dependent sources, and the mechanism underlying these sources is an extension of the Divine Revelation in the entire legal sphere. This methodology of legislation at work in Islam is the result of the idea of supremacy and sovereignty of God Who alone is the authority of last and ultimate decision.

The remarkable dependent sources of Islamic Law are *Ijmā'* and *Ijtehād* which covers *Qiyās*, *Istehsah Istislal* and custom. These are not, strictly speaking, the sources (roots) of Islamic Law. These are in fact the methods of discovering the law from the Islamic social system. Being very important and indispensable, these are usually known as the secondary or dependent sources of Islamic Law.

1—Ijmā' (Consensus of Opinion)

The Islamic social system was established by the Qur'ān and the *Sunnah*. The Qur'ān has been universally (تواتر) transmitted by one generation to the other. The history of

the *Sunnah* is called traditions. These are of three kinds: 'Sayings', (قولی) 'Actions' (فعلی) and 'Implied Consents' (تقریری) of the Prophet (peace be upon him). There might have been some traditions particularly of the last category which might not have been narrated specifically by the traditionists. The instances of such cases might be, undoubtedly, a few. But keeping in view the comprehensive nature of a civilised and complex social system, and the limitations of human observation and verbal expression, however devouted it may be, such possibility cannot be ruled out. The observations of the Anthoprologists on the transmission of culture from one generation to the other are relevant on this point. They say that it is through a combination of verbal transmissian and the shaping of individuals to the patterns by other individuals, that the social system is perpetuated. The first task confronting the investigation is that of ascertaining what the patterns are. Societies vary greatly in the degree to which their patterns are conscious and verbalized. No society is completely conscious of the patterns and the individuals mostly act unconsciously. This puts limitation on the verbal expression. According to them the best way to establish the patterns is by a combination of statements and case histories. Either of these classes of evidence is unsatisfactory if taken alone. Certain patterns may be almost unconscious while many may be atypical. The Comanche tribe of Madagascar provides concrete example of this phenomenon. It would never occur to a Comanche to tell an investigator that in case of an attack on the camp, it was expected that a son-in-law could help his mother-in-law to escape before he tried to save himself or his property. If he failed to do this, the mother-in-law would order her daughter to leave him. The informant would only say vaguely that a son-in-law should respect and help his mother-in-law. In an actual case of this sort, the group felt that the mother-in-law was quite justified in dissolving the marriage. Although, as Iqbal has said in *The Reconstruction*

of Religious Thought In Islam[1] that the traditionists have rendered great service to Islam by collecting the *Sunnah* in concrete form, yet there are some traditions which are abstract. Moreover every aspect of the concrete might have not been put into writing, particularly the subjective aspect.

From where to find out these aspects ? From the Islamic social system itself. The society which was established by the Qur'ān and the *Sunnah* has not died away. It is a living society and spread all over the world. Its universal practices, the beliefs and the actions unanimously recognised by the Muslims, are the carriers of those few missing links.

The Western legal systems which seek origin into the old customs and precedents of the society fill in such vacuums from the juristic writings and textbooks of the scholars. This tendency of the Western legal systems has been dicussed by Roscoe Pound in *The Formative Era of American Law.*

The Muslim jurists like Āmidī and Fakhr al-Islam have written that *Ijmā'* does not have a basis independent of Islamic social system founded and accomplished by the Holy Prophet (peace be upon him). Though the acts of the Prophet (peace be upon him) may not be clearly stipulated by *Ijmā'* yet there is irrebuttable presumption that *Ijmā'* must have clustered around some active or implied action of the Prophet (peace be upon him). In the opinion of Fakhr al-Islam Bazdawī it is unimaginable that the Muslim scholars get united over a thing without some legal basis. In his terminology it is called the 'foundational cause of *Ijmā'* (السبب الباعث على الاجماع). This foundation, according to him, is either tradition or analogy but its discussion becomes irrelevant after the consensus is established.[2]

The practice of the righteous caliphs (خلفاء راشدين) is also

1. Mohammad Iqbāl : *Reconstruction of Religious Thought in Islam,* p. 173.

2. Abū Zahrā : *The Life of Abū Hanīfā*, page 503.

authenticated on the same principles. Mulla 'Alī Qārī says :

فانهم لم يعملوا الا بسنتى فا الا ضافة اليهم
انما يعملهم اولا ستنباطهم و اختيارهم اياها ـ

"For they acted only upon the *Sunnah* and based their reasoning and practice absolutely on it."[1]

The jurists hold that *Ijmā'* is a sign and indiction of the existence of authority from the Qur'ān or *Hadīs*.[2] The majority of the jurists are of the view that *Ijmā'* must carry with it some authority from the Qur'ān and the *Sunnah* because it is not permissible to legislate in Islam without reference to some authority.[3] It so happens, sometimes, that after *ijmā'* has been effected on a certain point, it becomes an established law. It becomes a common practice to quote law without reference to the relevant authority. This practice is usually followed in the famous books of law like *Radd al-Muhtār Shāmī* and *Fatāwā 'Ālamgīrī*. The result is that legal provision prevails and the authority is lost.

"When the jurists are unanimous on a certain point of law, they forget about the source thereof. And due to the significance of *Ijmā'* thereon, the incentive to quote the authority also weakens. This is the state of affairs in most of the *Ijmā'ī* matters. Therefore, the doctors of Jurisprudence were compelled to recognise *Ijmā'* as the third source."[4]

The second significanec of the doctrine of *Ijmā'* is it sanction for the delegated legislation of the Muslim community. The increased complexity of the society requires the formation of rules and regulations for the implementation of the law. The body responsible for the application of law

1. *'Mirqāt*. v. 1, p. 30.
2. Ashraf Ali Thanwī: *Al-Intibahāt*, p. 80.
3. Amidī: *Al-Ihkām*, v. 1, p. 135.
4. Shah Walī-Allah: *Qurrat al-'Ainain*, p. 40.

can be the best judge of the situation and thus in a privileged position to frame the rules accordingly. To meet this object the rule-making powers are delegated to the implementing bodies. Alongwith such powers guiding principles are also provided by the empowering legislation. The rules must remain within the guiding principles otherwise the rules become *ultra vires*.

The Muslim society must also require such a rule-making power to meet the practical problems for inplementation of the injuctions of the *Shari'ah*. That power is given by way of *Ijmā'*. The legislative bodies of an Islamic country do enjoy such powers. This is not making the law, this should be called implementing the law (استعمال الاجتهاد). For instance, it becomes difficult and complicated in a complex society to prove the transaction of marriage. The compulsory registration of marriage may be required by the Legislature of an Islamic country. Fitzgerald writes:

> "The Ottoman Family Law of 1917, is a best illustration of the support of the argument for making as compulsory the registration of Muslim marriage through the doctrine of *Ijmā'*".[1]

The doctrine of *Ijmā'*, therefore, performs two functions: discovering the law and implementing the law. In the words of Iqbal:

> "The former function relates to the question of fact and the latter relates to the question of law. In the former case, as for instance, the question arose whether the two last *Sūrāhs* of the Qur'ān known as *Mu'awwizatian* (معوذتين) form part of the Qur'ān or not, and the Companions unanimously decided that they did, we are bound by their decision, obviously because the companions alone were in a position to know the fact."[2]

1. 'Muhammadan Law', p. 95.
2. 'Reconstruction of Religious thought in Islam', p. 175.

The sanctity which has been attached to the latter case i quite natural and in keeping with the usual practice of th society.

Ralf Linton says:

> "The contagion of emotions and their heightening through group participation are familiar to all of us through personal experience, although the mechanisms responsible for them are very imperfectly understood. Emotions will run through crowds, being heightened in the various individuals, by the fact that they are part of the crowd, and making these individuals behave as they would not behave if isolated. This induction of emotions in less violent and obvious form, is constantly at work among the members of a society. Ideas and emotions are reinforced in each individual by his contacts with other individuals who share them. The more completely such things are shared by every one in the group, the surer each member becomes that they are right. The dictum that, 'fifty million Frenchmen can't be wrong' (compare it with the dictum of 'Abdullah bin Mas'ūd, often wrongly attributed to the Prophet ماراه المسلمون حسنا فهو عندالله حسنا which means 'whatever is thought by the Muslims to be good is good in the eyes of God'), given by one of them is a slightly naive expresion of this condition. It is the sharing of a mass of ideas and emotional responses by the members of a society which gives the society its *esprit de corps* and with it unity of will and capacity of voluntary uni'ed action."[1]

Definition and Classification Ijmā'

There are many provisions in the Qur'ān and *Sunnah* whic sanction the authenticity of *Ijmā'*. Shāfi'ī was asked by son person to give argument in support of *Ijmā'* from the Qur'ā He recited the following verse[2]:

1 'The Study of Man', p. 94.

2 *Nuzhah Sharh Lum'ā*, p. 576.

وَيَتَّبِعْ غَيْرَ سَبِيلِ الْمُؤْمِنِينَ نُوَلِّهِ مَا تَوَلَّىٰ وَنُصْلِهِ جَهَنَّمَ وَسَاءَتْ مَصِيرًا۔

(النساء : ۱۱۵)

"And he who follows other than the way of the believers, We shall turn Our back on him as he has turned his back; and We shall make him reach Hell, and a bad journey shall it be." (Q. 4 : 115)

The phrase *Sabīl al-Mu'minīn* (سبیل المومنین) which means 'the way of believers', is the precise definition of *Ijmā'*. Technically it is defined as:

"The consensus of the jurists of a certain period of the Muslim community (امت) over a certain religious matter (امر شرعی)."[1]

The definition has got the the following ingredients:

(*i*) *The consensus* (اتفاق)—The majority of the jurists is of the view that unanimity is a pre-requisite for *Ijmā'*. If there is a dissension, although it is by a small minority, *Ijmā'* will not be constituted.[2] However, Tabarī, Abū Bakr Rāzī and Shah Walī Allah Dehlawī hold that *Ijmā'* may be constituted by majority also.[3]

Consensus may be reached through three stages. Firstly the people express their views. Secondly, discussions and debates take place. Thirdly, the differences are dropped and they agree on one point.[4]

Ṣadr al- Shari'ah has pointed out that this is not necessary for the constitution of *Ijmā'* that there should be nobody who expresses the contrary view. It only means that if somebody openly expresses the different view, he is openly condemned by

1. Bazdawī: *Kashf*, v. 2, p. 227; Chazālī: *Mustaṣfā*, v. 1, p. 173; Muhibb Allah Bihārī: *Musallim al-Thabūt*, v. 2, p 211.
2. Āmidī: *Al-Ihkām* v. 1 p. 120.
3. Shah Walī Allah: *Qurrāt al-'Ainain* p. 254.
4. Shah Walī Allah: *Qurrāt al-'Ainain* p. 251.

the others.[1]

Ijmā' constituted by majority (کثرت) is binding in action (واجب) but it is not obligatory (فرض) to believe in its truth also. It is not absolute like *Ijmā'* by unanimity (اتفاق), in the sense that a person disputing it would become an infidel.[2]

(*ii*) *The Jurists*—In every field of knowledge, only the opinions of the experts are admissible. The jurists being the experts, only their opinions are relevant for *Ijmā'*.[3] There are, however, two kinds of religious matters. There are matters which do not require any advanced knowledge for their recognition; such as saying the prayers five times a day, keeping fast during the month of *Ramaḍān*, etc. These matters do not call for any discrimination between the jurists and the general public. There are other matters which are beyond the reach of the competence of the public at large and which require skilled opinion; such as the rites of marriage, the rules of divorce, the principles of sale, etc. In the latter category only opinions of the jurists are admissible and the views of the general public are irrelevant.[4]

(*iii*) *Jurists of a particular period*—There could be no law laid down by *Ijmā'* during the Prophet's (peace be upon him) life time

Ijmā' of one age may be reversed by subsequent *Ijmā'* of the same age. Similary *Ijmā'* of one age may be superseded by *Ijmā'* of a subsequent age. But the *Ijmā'* arrived at by the Companions is incapable of being reversed or superseded.[5]

1. *Tauḍih* v. 2 p. 46.
2. Bazdawī : *Uṣūl with Kashf*, v. 3 p. 262.
3. Shawkānī: *Irshād al-Faḥūl* p. 88.
4. Bazdawī: *Uṣūl with Kashf* v. 3 p. 239.
5. *Kashf al-Asrār* 'alā Bazdwai's *Uṣūl* v. 3 p. 262.

(*iv*) *Jurists to be the Muslims*—The views of the jurists belonging to the non-Muslim communities are not admissible for *Ijmā'*.

(*v*) *Consensus on a religious matter*—The religious matters may be of two kinds: points of fact and points of law. *Ijmā'* on the matter that the text of the Qur'ān which is with us, is the same that was revealed to the Prophet (peace be upon him), is *Ijmā'* on point of fact (اجماع نقلی). *Iimā'* on the matter that the government of the Muslims must have representative capacity and should be run by consultation, is *Ijmā'* on point of law (اجماع اجتہادی).

Repeal of Ijmā'

Repeal (نسخ) means abrogation of the legal effect of a text by means of another text (نص بنص). *Ijmā'* is not in itself a text. It is an opinion or judgment based on the authority of some text which may or may not be quoted alongwith. The texts āre contained only in the Qur'ān and the *Sunnah*. Thus *Ijmā'* cannot repeal the Qur'ān or the *Sunnah*.

The doctors of Islamic Juriprudence are generally of the view that *Ijmā'* can neither repeal anything nor can be repealed by anything (الاجماع لایصلح ناسخا لشیی ولا منسوخا بشیی). Fakhr al-Islām Bazdawī, however, is of the view that a latter *Ijmā'* can repeal a former *Ijmā'*.[1]

There is no contradiction between Bazdawī and the other doctors if it is kept in mind that Bzadawī has used the word repeal (نسخ) in the sense of supersession (تقدیم). Furthermore, keeping the context in view, he means by *Ijmā'*, *Ijmā'* on point of law (الاجماع الاجتہادی) and not *Ijmā'* on point of fact (الاجماع النقلی). Supersession of an earlier *Ijmā'* on finding of fact by a later *Ijmā'* of that kind is not possible. Whereas, *Ijmā'* on point of law or interpretation can be superseded by

1. *Kashf al-Asrār 'alā* Bazdawī's *Usūl* v. 3 p. 176, 262.

another such *Ijmā'*. And this is what Bazdawī wants to say, and the view of the majority should be confined to the *Ijmā'* on points of facts.[1]

The Orientalists

The Orientalists, among whom Goldziher is the most remarkable, have criticised *Ijmā'*. According to them many un-Islamic things were introduced into Islam through this doctrine. The actions which were considered *Innovations* (بدعات) by the earlier Muslims, became customary among the later Muslims. The *Ijmā'* has been responsible for effecting drastic changes in the Muslim society.[2]

The criticism of the Orientalists shows that they have not rightly understood the concept of *Ijmā'* in Islam. They think that *Ijmā'* is gathering of the people on a certain practice and it is possible against the Qur'ān and the *Sunnah*. They are absolutely wrong in thinking like this. Every jurist of Islam has clearly stated that there can be no *Ijmā'* which is against the Qur'ān and *Sunnah*. How can *Ijmā'* Islamicise the matters declared un-Islamic by the Qur'ān and *Sunnah*? Secondly *Ijmā'* means the consensus of jurists. If some practice becomes popular among the people and is condemned by jurists, it cannot be said that there is *Ijmā'* on that.

Ijtihād

In the *Critique of Pure Reason*, Kant has very rightly said that every event is unique. The main difficulty which was disturbing Plato before he met Socrates was the uniqueness of every event. Plato said that it is not possible to put the foot twice in the same water, we lead an uncertain life. We cannot formulate rules and regulations about the course of events. Socrates solved this puzzle by giving him a satisfactory answer. The concrete events may be unique but their characteristics

1. Mar rūf Dawālibī: *Al Madkhal*, p. 343.
2. Encyclopaedia of Islam : *Ijma'*.

are repeated. We can formulate laws according to the characteristics exhibited by events.

Every event is unique, just as every individual is unique. No two individuals are identical. In spite of that people can be categorised on the basis of their characteristics. Psychologists and sociologists have formulated laws according to which the human beings act. Similarly the events can be classified on the basis of either the presence or absence of certain characteristics. Two or more events can be placed under one head if they possess certain characteristics in common, Categorization varies with the circumstances under which it is done. The arrangement and the classification of the same data by a biologist will be different from that of a chemist. Every event and thing has got numerous characteristics and the categorization depends upon who is doing, how is doing; and, for what purpose. If we know that some events with such and such characteristics meet a particular fate, and we happen to see an identical event, we can safely say that it will meet the same fate. When there is fear and competition between two civilizations, they will progress and become strong. With the cessation of fear and competition between the two, their downfall begines. This is Arnold J. Toynbee's Theory of Civilization. Therefore, whenever we happen to see the phenomenon of fear and competition between civilizations we can predict that they will rise and go strong. This is called reasoning by way of Analogy or *Qiyās*.

According to Ibn Qayyim the proposition that the laws of the Qur'ān and *Sunnah* an limited whereas the possible cases are unlimited, is a wrong conception. The acts and transactions if classified according to their categories are limited in number; and God and the Prophet (peace be upon him) while expressing the Divine Will, cover series of acts and transactions at one and the same time. Furthermore, the injunctions of the *Shariah* are

in the form of axiomatic expressions. For instance, the saying of the Prophet (peace be upon him) that all intoxicants are forbidden implies that what is not intoxicant is permissible.[1]

Shah Walī Allah has further elaborated this point. He says that it is not possible for a legal system to address and prononce the legal nature of every act of each and every individual. Even if it is done, it will not be possible to know innumerable and scattered bits of legal injunctions. The Law-Giver (شارع) categorizes a series of human actions and pronounces its legal status whether it is desirable or undesirable.[2] For instance, all the transactions which fall under the category of sale (بیع) are covered collectively by the injunction, "God has permitted the sale" (احل الله البیع)

Phenomena are conrete, innumerabe and scattered. It is possible to have scattered and unintegrated bits of knowledge about the phenomena as they are called to one's attention. This type of knowledge does not constitute Science. For a knowledge to be scientific it should be systematic and empirically verifiable. Objective verification does not mean that the role of reason and the process of conceptualization is eliminated. This is a fallacy which Professor Whitehead has exposed under the name of the "Fallacy of misplaced concreteness".[3] In scientific knowlege reason is subordinated to precisely defined techniques and principles of procedure.

A phenomenon may have many characteristics. Every scholar will observe that from his own angle and pick up the characteristics relevant to his field of knowledge. A biologist will make a different statement about a phenomenon than that of a physicist or a jurist. This is conception of the phenomenon. A conceptualized statement about a phenomenon is called 'fact'. If there are objective standards for the observation and verifica-

1. Ibn Qayyim : *I 'lām al-Muwaqqi'īn*, v. 1, p. 21.
2. Shah Wali-Allah: *Hujjat-Allah al-Bāligḥah*, v. 1, p. 93.
3. Whitehead, A.N., *Science and the Modern World*, p. 75.

tion of a fact, it is an empirically verifiable or a scientific fact. Henderson defines a scientific fact as :

> "Empirically verifiable statement about phenomena in terms of a conceptual scheme."[1]

The logical interrelationship between empirically verifiable facts is called theory.

> "Theory proper, then, is confined to the formulation and logical interrelations of propositions containing empirical fact."[2]

A theory after being empirically validated and established becomes 'law'.

Islamic Jurisprudance is a science. Its techniques and principles of procedure are well defined and objective. The laws derived thereby are objectively verifiable by all the Doctors. By making the *Shari'ah* scientific God has absolutely eliminated the scope of independent legislation. This has ensured the complete and immutable **rule of the Shari'ah** A human action is a phenomenon. On the basis of common characteristics, human actions or phenomena are categorized. The categories of human actions are subjected to the positive or negative will of God. The interrelationship of a category of human actions and the will of God (حكم) is an Islamic law.

The will of God is preserved in the texts of the Qur'ān and the *Sunnah*. These texts are all pervading and comprehensive. No exigency of the human affairs (امر) has been spared (مهمل). For the last fourteen centuries no human situation could be pointed out on which the *Shari'ah* is silent. This eliminates subjectivism and scope of personal element from the one variable of Islamic law. God has made meticulous arrangement to keep the other variable of categorized human actions objective and empirically varifiable.

1. Henderson, L. J. 'An Approximate Definition of Fact', *California Publications in Philosophy*, v. 14, p. 192

2. Parsons, Talcott., 'Structure of Social Action', p. 24.

Every law has in regard a certain policy, wisdom or object (مصلحت ، حکمت ، مقصد). This is to promote the welfare of the human beings. General welfare or *maslaha* is something very abstract, general and uncertain. Its realization and assessment is almost subjective. It is neither objectively verifiable (ظاہر) nor clearly definable (منضبط). If laws are based on it, it would introduce a lot of bias and scope for personal opinion. To avoid the subjectivity laws of the *Shari'ah* are not based on *maṣlaha*, although that is the object for their enactment.[1] The laws are, instead, based on the characteristic which is objectively verifiable (ظاہر), clearly definable (منضبط) and is usually coexistent with the *maslaha*.[2] Such characteristic is treated by Law-Giver as indicator (مظنہ) of the respective *maslaha*, and technically it is named as *'illah* (علت) or basis of the law. *'Illah* is sometimes called *munaṭ* (مناط) also. The *'illah* and the *maṣlaha* usually coexist but not always. Dark clouds are indicator of rains but sometimes it may not rain in spite of dark clouds. Notwithstanding this possibility dark clouds are considered the indicator of rains. Similarly the *'illah*, even if divested from the *maṣlahā*, retains the character of being the basis of the law. Journey (سفر) is the legal excuse for not keeping the fast. In this law journey is the *'illah* and hardship of journey is the *maṣlaha*. Journey shall remain still a legal excuse even though there is no hardship due to the facility of travelling in the aeroplane. The *maṣlahah* may be absent but the *'illah* is there which is the basis of the law. On the other hand, in the case of a labourer in a factory, the *maṣlaha* of hardship is there but he cannot avail himself of this legal excuse because the *'illah* of journey which is the basis of the law is not present in this case.[3] Exceptions, however, prove the rule. The *Shari'ah* as a whole maintains the policy of welfare. *Maslaha* and *'illah* normally and usually do coexist.

1. Shāh Walī Allah : *Hujjat-Allah al Bāligḥah*, v, 1, p. 129.
2. Ibid, p. 130.
3. Shah Walī Allah : *Hujjat-Allah al-Bāligḥah* v. 1, p. 122.

The indicative characteristics (مظنات) can only be changed by the prophets, and this is one of the factors which made the revealed religions different from each other.[1]

There is consensus of opinion among the jurists that the *'illah* must be objectively verifiable and clearly definable.[2] In this manner both the variables of Islamic law have been made empirically verifiable and, thus, scientific.

Definition and Classification of Ijtehād

Ijtehād literally means to exert. In the terminology of Islamic Jurisprudence it means to exert with a view to form an independent judgment on a legal question. The *mujtahidūn* or the jurists exert to find out laws from the Qur'ān and the *Sunnah* and apply to the prevalent conditions of the society. This exertion has been ordained in the Qur'ān :

> "We have sent down to you the Book in truth, so that you might judge between men as guided by Allah."
> (Q. V: 105)

This verse cleary implies to understand the guidance provided by God and apply that to decide the living problems of the people. This is, in substance, the scope of *Iitehād.* Shah Walī Allah has described the scope of *ijtehād* in a beautiful way. He says that the object of *ijtehād* is to exert to know that if this problem had occurred before the Prophet (peace be upon him) what would have been his judgment?[3] The famous interview of Mu'ādh bin Jabal by the Prophet (peace be upon him), at the time of his appointment as judge (قاضی) of Yemen has been narrated in the famous book of traditions *Mishkāt al-Masābih* on the authority of Abū Dāwūd, Tirmidhī and Dārimī. The Prophet (peace be upon him) asked him what he would do to solve the problems if he could not find the explicit texts from

1. Shah Walī-Allah, *Hujjat-Allah-al-Bāligḥah* v. 1 p. 123.
2. Khuḍarī : *Usūl al- Fiqh*, p. 351.
3. Shah Walī-Allah : *Fuyūḍ al-Haramain*, p. 48.

the Qur'ān and the *Sunnah*. Mu'ādh answered that he would do *ijtehād* without personal bias (اجتہد برای ولا آلو). The Prophet (peace be upon him) appreciated his answer.

The starting point of such an endeavour, according to the tradition of Mu'ādh, is the absence of any clearly applicable text, and it may operate only so far as such thinking does not contravene the Qur'ān and the *Sunnah*. In the words of Gibb:[1]

> "*Al-Iitehād* in no way implies, as some modernists would like us to believe, freedom of judgment. The aim of those who practised *Al-ijtehād* was not to modernise Islam, but in order to return to the practice of the original model community."

Ijtehād can be classified into three kinds;

(*a*) *Al-Ijtihād al-Bayānī* (الاجتہاد البیانی).
This kind of *ijtehād* has been briefly discussed under the heading of 'The Rules of Interpretation'.

(*b*) *Al-Ijtehād al-Qiyāsī* (الاجتہاد القیاسی)
This kind of *ijtehad* is usually called *Qiyās*. It literally means measuring or judging the things on the basis of equality and analogy. As a term of Islamic Jurisprudence it has been defined by Āmidī:

انہ عبارۃ عن الاستواء بین الفرع والاصل فی العلۃ المستنبطۃ من حکم الاصل۔

(الاحکام فی اصول الاحکام ج ۳ ص ۱۷۴)

> "It means that the parent event or thing and the others have the common characteristics which become the basis for the parent event or thing to have a particular legal fate."

For instance, wine has the legal fate of being prohibited. The context under which the prohibition of wine was revealed and the practice of the Prophet (peace be upon him) thereafter shows that the basis of prohibition of wine is its characteristic

1. Gibb, H.A.R. 'Modern Trends in Islam', p. 13.

of causing intoxication. So, every intoxicant shall meet the same legal fate of being prohibited.

Qiyās is constituted by four elements (ارکان اربعہ):

(*i*) Parent thing (الاصل). This is in the form of a specific precedent or a decided case which acts as an authority to decide the new case.

(*ii*) New thing or situation (فرع). This is like the case in issue having common characteristics with the parent thing.

(*iii*) Legal effect of the parent thing (حکم الاصل).

(*iv*) Basis (الوصف الجامع). The characteristic (علت) of the parent thing which becomes subject matter of the legal effect. It is like *ratio* of a decided case.

It should not be defined as 'effective cause'. *'Illah* is a sign (مظنہ ، علامت) by which the applicability of law of a text becomes known. It is the Lawgiver who brings into existence the law and not the *'illah* or *maslaha*.[1] It may be defined as the characteristic which the Law giver (شارع) had in regard in laying down the law embodied in text. When the *'illah* of a text is determined the jurist is in a position to apply the law of the text to a case in which the same *'illah* is present.

'Illah may be determined by the clear (صریح) text of the Qur'ān, the *Sunnah* and *ijmā'* or by indication (ایماء) or inference (استنباط) therefrom.

Al-Ijtihād al-Qiyāsī is similar to invention (ایجاد) in the physical world. Invention is the new application of the already existing knowledge. *Qiyās* is the judgement of a new specific case on the line of a specifically decided matter.

(*c*) *Al-Ijtihād al-Istiṣlahī* (الاجتہاد الاستصلاحی)

In this kind of *ijtihād* a specific problem arises which has no identical precedent (نظیر), its legal position is decided on the basis of argument (دلیل شرعی) on the authority of some general maxims or principles of law

1. *Taudhīh* p. 311

(القواعد الكليه). This kind will be discussed in the seventh chapter on *Istehsān* (استحسان).

Shāfi'ī is of the view that *ijtihad* and *Qiyas* are one and the same thing. In Chapter XII of *Al-Risālah*, he says;

> "He asked: On what ground do you hold that on matters concerning no text is to be found in the Book, nor in the *Sunnah* or consensus, recourse should be had to analogy? Shāfi'ī replied: On all matters which touch the life of a Muslim, there is either a binding decision or an indication as to the right answer. If there is a decision, it should be followed; if there is no indication as to right anwer, it should be sought by *ijtihad*, and *ijtihad* is *Qiyas*."

Shāfi'ī does not include 'indication as to the right answer' in his definition of *Ijtehad* or *Qiyas*. For such matters he employs the term *Istiṣḥāb* (استصحاب), etc. There are jurists who describe *ijtehad al-bayanī* and *ijtehad al-istiṣlaḥī* (استصحاب ، استحسان ، مصالح المرسلہ) under the heading of *istidlal*[2] (استدلال) which literally means interpretation of texts.

Taqlīd (تقليد): (Adherence to the established rulings)

The matters which are self evident (صريح) in *Shari'ah* do not require *ijtehad* or *taqlīd*. But the matters which require *ijtehad* are concerned with those also who are not jurists. They have no recourse except to accept and follow the decision of some jurist. *Taqlīd* is, therefore, an administrative necessity. In the above-mentioned tradition of Mu'ādh, *taqlīd* is also estabiiseed. Mu'ādh, was authorised by the Prophet (peace be upon him) to do *ijtehad* for the peaple of Yemen. It necessarily implies that the people of Yemen were also bound to accept and follow his *ijtehad*. Ibn al-Hummām defines *taqlīd* as :

"*Taqlīd* is following the decision of a jurist without

1. Abū Zahrāh: *Usūl al-Fiqh*, p. 291.
2. Ibn Hājib: *Mukhtaṣar*, v. 2 p. 280.

demanding arguments for that (due to confidence in his learning)."[1]

How can a commoner recognize a jurist? Ghazālī answers this question as follows.

> "This is just like the case of a person who is not a doctor and he is suffering from some disease. He will approach a doctor who is universally acknowleged as a competent doctor and the students of medicine think high of him. Similarly a common man can consult the jurist who is universally acknowledged to be so and the general lawyers also recognise his competence."[2]

The doctrine of *taqlīd* makes adherence to the established authority obligatory. Absolutely independent interpretation of law by a person who is not qualified to be a *mujtahid*, is violation of *taqlīd* and leads to misinterpretation and distorsion of the legal principles. For instance, with the advent of the British Rule in he Indo-Pakistan subcontinent, the English oriented laws superseded the Islamic Law; but in the domains of personal law, gift, *waqf*, etc. the Islamic Law was kept continuing. In these domains the Islamic Law was interpreted and implemented through the courts presided by the British judges and Indian judges trained in English jurisprudence and law. Not only that they lacked the qualifications of *ijtehād*, but also they looked towards the Islamic Law through the spectacles of English jurisprudence. Whenever they violated the doctrine of *taqlīd* and resorted to independent interpretation parallel to that of the established doctors of Islamic Law, they inevitably diffused the English rules of equity, justice and good conscience into the Islamic Law. The courts regarded the traditionals *shari'ah* law, like the English common law, subject to modification by the subjective standards of equitable jurisdiction. This led to the fusion of the two systems of

1. Amīr al.Bukhāri: *Taisīr al-Taḥrīr* v. 4, p. 246.
2. Ghazāli: *Al-Mustasfā*, 2 p. 126.

law and gave affect to what is termed as Anglo-Muhammadan Law, which diverged in many particulars from the traditional *shari'ah* law. Coulson says:

> "British judges had failed to appreciate the real significance of *Taqlid*, but had assumed that traditional Shaī'a law was just as much subject as the English common law to modification by those equitable principles which had found acceptance in the courts."[1]

Necessity of Ijtehād

It is the fundamental belief of every Muslim that Islam is the complete and the last edition of Divine Guidance. Human beings do not require any further Divine Guidance. Innumerable precedents in concrete form given by the Prophet (peace be upon him) and his companions covering every walk of human life, provide guidance for all times and localities. The following versus of the Qur'ān point out the comprehensiveness of the Islamic Law:

وَنَزَّلْنَا عَلَيْكَ الْكِتَابَ تِبْيَانًا لِّكُلِّ شَيْءٍ ۔ (النحل : ٨٩)

"And We have sent down to thee, the Book explaining everything." (Q. 16 : 89)

مَا فَرَّطْنَا فِي الْكِتَابِ مِنْ شَيْءٍ ۔ (انعام : ٣٨)

"We have omitted nothing from this Book." (Q. 6 : 38)

فَإِنْ تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ (النساء : ٥٩)

"If there is difference among you over anything, refer it to God (Qur'an) and the Prophet (*Sunnah*)."
(Q. 4 : 59)

Such an absolute order to refer anything to the Qur'ān and the *Sunnah* is justified only if there is solution for everything therein.

The provisions of the *Sunnah* are deemed to be the provi

1. Coulson N J. *A History of Islamic Law*, P. 120.

ions of the Qur'ān as the former have been authenticated by he latter. Whenever 'Abdullah bin Mas'ūd's proposition was challenged, he always said that it was in the Qur'ān and then would narrate a tradition. If somebody objected that he claimed his support from the Qur'ān but cited the tradition nstead, he used to recite the verse:[1]

مَآ اٰتٰىكُمُ الرَّسُوْلُ فَخُذُوْهُ وَمَا نَهٰىكُمْ عَنْهُ فَانْتَهُوْا۔ (حشر : ۷)

"So take what the Apostle assigns to you, and deny yourselves which he withholds from you." (Q. 59 : 7)

The Holy Prophet has also emphasised that no guidance hould be sought from outside the sphere of the Qur'ān and *Sunnah*. He says:

من عمل عملاً ليس عليه امرنا فهو رد

(بخاری ج ۲ ص ۱۰۹)

"He, who did something which is not based on our authority is condemned."[2]

On the one hand there is this fundamental requirement rom every Muslim. On the other hand the prophethood of Muhammad (peace be upon him) is not limited to any specific ime or locality. It is universal and for all times to come.

قُلْ يٰٓاَيُّهَا النَّاسُ اِنِّيْ رَسُوْلُ اللّٰهِ اِلَيْكُمْ جَمِيْعًا۔ (الاعراف : ۱۵۸)

"Say, O men I am sent unto you all, as the apostle of Allah." (Q. 7 : 58)

And universe is not stationary. New facts and situations continue to arise. To meet this problem, God authorised the Muslims to do *Ijtehād* and the Prophet supervised and trained

1. Aḥmad bin Ḥanbal: *Musnad*, v. 3, p. 216.
2. Bukhārī: *Ṣaḥīḥ*, v. 2 p. 109.

his Companions in this faculty in the speedily changing societ under his control.

The problem of change is not new. This is as old a humanity. Margaret Mead writes:[1]

> "Technical change is also as old as the civilization and since time immemorial the ways of life of the whole have been transformed by the introduction of new tools and new technical procedures. ..... Population balance and whole religious system has been upset by some changes in technology; just as the inventions which underlie technological changes have themselves arisen from changing conception of nature and of men. Nor is the attempt to control technological change new."

1. *Cultural Patterns and Technical Change*, p. 12.

6

Islamic Law and Social Change

The nature and scope of social change is directly related to he nature and scope of *Qiyas*. If the changed society evolves into omething altogether new, there remains no scope of analogy be-ause analogy presupposes some similarity between the two. If he changed society is absolutely the same, there is no need for ny analogy because nothing new has cropped up. If the ature of change in a society is in between these two categories, t should be thoroughly understood what aspects of social pheno-nena maintain their recurrence and how! Only then the vorking of *Qiyas* (analogy) can be properly explained. To tart with, we will have to examine first, structure and function f society, inter-relationship and inter-dependence of exponent arts of the society, its static and dynamic aspects, and primary nit of social phenomena as atom is in Physics and molecule n Chemistry.

tructure of Socio-Cultural Phenomena

The inorganic phenomena have only one physio-chemi-al component, and organic phenomena have two compo-ents—physical and vital (life). The socio-cultural or super rganic phenomena have three components, the immaterial symbolic) component of meaning (or meaningful values or

norms or patterns) is superimposed upon the physical and vital component. This realm of meanings-values-norms-patterns is a reality different from the inorganic and organic forms. The component of meaning is decisive in determining whether a phenomenon is socio-cultural. Its presence radically changes the very nature of the inorganic or the orgaic phenomena upon which it is superimposed. Without meanings the Qur'ān simply becomes a physical object possessed of a certain geometrical form with certain physical and chemical properties. On the other hand the meaning of the Qur'ān can be objectified and materialized to revolutionize the entire world Without the component of meaning, there is no difference between rape, adultery, fornication and lawful marriage The purely physical act of copulation may be identical in all these actions that vary so profoundly in their socio-cultural significance.

Innumerable meanings are superimposed upon biological organism by the socio-cultural world. This makes the persons and groups functioning not only as physical objects and biological orgnisms but also as mindful human personalities as bearers, creators and agents of immaterial (symbolic) meanings, values, norms and patterns. Thus any phenomenon that is an objectification of mind and meanings superimposed upon its physical and/or bioliogical properties is the definition of socio-cultural phenomenon.

All the bio-physical objects and energies beginning with the simplest tool made of the simplest part cut and ending with the machinery and atomic fission, make up the material structure of the humanity. The totality of meanings-values patterns possessed by individuals or groups makes up their ideological cultures. The totatily of their meaningful action through which the pure meanings-values-patterns are manifested and realized, makes up their behavioural culture. And the mindful or conscious human beings and groups, that create operate and use these three aspects of cultures constitute society

Inter-Relationship of Socio-Culture Phenomena

An assortment of physical and biological objects causally unrelated to one another, becomes a conserver for a system of meanings-values-patterns if a causal and tangible inter-dependence appears between the physical and biological members of that assortment. For instance, many persons, books, instruments, buildings are not causally connected with one another through their purely physcial and biological properties. But when they become the careers and agents of a unified system of meanings-values-patterns called the 'Punjab University', a causal interdependence connects them. A significant change in one part of the university tangibly influences the other parts. The destruction of its main library would lead to a notable decrease in the budgets of all other departments.

The degree of interdependence of the components of a bio-physical system depends upon the extent to which the parts of the cultural system of meanings-values-patterns imposed upon it, is interdependently harmonious. If most of the propositions are consistent the totality is called a meaningful unity or system. None of the propositions can be radically changed effecting the others and making it necessary to change them in order to re-establish their consistency.

The degree of interdependence gives effect to three classes of social system:

(*a*) If an intervening group of individuals has as its *rason d'etre*, a consistent set of meanings-values-patterns that satisfies their needs and for whose maintenance and growth, the individuals are bound together into one collectivity with a definite and consistent set of law-norms or patterns of behaviour prescribing their conduct and inter-relationship, such a social group is a social system.

(*b*) If the mindful individuals do interact with each other, but do not have a consistent set of meanings-values-

patterns, prescribing the form of conduct and inter-relationship of the inviduals, such a group of anarchically interacting inviduals represents a social congeries or unorganised social group.

(*c*) In between the perfectly organised and unorganised social system there are many intermediary semi-organised groups of various degrees of organisation.

According to Talcott Parsons the most important characteristic of a social system is the harmony of its components. He says:

> "The most general and fundamental property of a system is the interdependence of parts or varibles."[1]

Differentiation and Stratification of Social Systems

A perfectly organised and integrated social system is completely differentiable. Practically all actions of the members and all their relationships are crystallised clearly and consistently. Each member has a definite pattern for each of his roles in inter-action for each configuration of circumstances. The meanings, values, law-norms and patterns of social systems define in detail what the rights, and duties of each member are; and, what, in regard to whom, when, how much, and under what conditions each member is entitled and obliged to do or not to do, to tolerate or not to tolerate. What the exact functions or roles are that a member has to play and what the status of each member is in the system of interaction as determined by the totality of his rights, duties, functions and roles.

A system can function in equilibrium if the pattern of behaviour and relationship is stratified also. Stratification means that the arrangments of the differentiated patterns and roles is in the form of hierarchy and gradation. By defining the rights and duties, the law-norms clearly indicate what

1. Parsons Talcott; *Towards a General Theory of Action*, p, 107.

relationships or forms of interaction are required from the parties as obligatory. What are prohibited and what are merely recommended. Those different levels of the required behaviour are under what conditions, when and in regard to whom?

Through their definition of the rights-duties, functions and status (role is the dynamic state of a status); and through that of the obligatory, prohibited and recommended relationships, the law norms make a group of interacting inviduals into a clearly differentiated and stratified body in which each member performs a specific task in the total functions of the group and in which each occupies a certain rank in its hierarchy of authorities.

The stratification excludes the possibilities of conflicts between the differentiated rights and duties over a particular occasion. Suppose two duties are imposed on an individual from two sides at the same time, and he can practically perform only one out of these two. The stratification will make his task easier. He can choose the obligatory and leave the recommended one. This can only happen if the social system is compeletely harmonious and thoroughly stratified.

The characteristics of differentiation and stratification are well exhibited by the system of Islam. Every behaviour pattern is finally defined and clearly arranged on the vertical scale (hierarchy) of obligatory, recommended, permitted and prohibited acts.

Main Cultural Systems

The basic ingredients of a cultural system are: language, science, philosophy, religion, fine arts, ethics, law and the derivative systems of applied technology, economics and politics. The bulk of the meanings-values-patterns of all these ingredients are united into one consistent ideological whole. This ideological whole is tangibly realized in all the material vehicles or the material culture, and in the behaviour of the creators,

bearers, agents or members of each of these systems, and socially expressed in the form of behaviour patterns of the individuals. The cultural or ideological whole is based on certain ultimate principles which are developed, differentiated and articulated in all the processes and behaviour of a social system. Depending upon the generality and nature of the major premises there are different and varying cultural wholes or super-systems. These major premises or ultimate principles concern the nature of the ultimate true reality or the ultimate true value.

Three main consistent answers have been given by the humanity to the question, "What is the nature of the true ultimate reality ?" One is : "The true ultimate reality is sensory. Beyond the realm of senses, there is no other reality or value. Sense experience is the only true avenue of knowledge. Only the empirical aspect of the world is accepted, rest is rejected". Most of the modern European and American cultures fall under this category of the super-system and is called the 'Sensate super-system.' Another answer to this question is, "The true ultimate reality-value is super-sensory and super-rational. The sensory or any other reality or value is either a mirage or represents inferior and shadowy pseudo-reality and pseudo-value. They reject the empirical, mundane or this worldly aspect of life. Cultural systems based on this premise are termed as 'Ideational'. The ideal Hindu culture or the European society of the Dark Age can be safely said to be its examples.

The third answer is, 'The true, ultimate reality is the manifold infinity. It is infinite qualitatively and quantitatively. The finite human mind cannot grasp or define it or describe it adequately in its finite platitude. The guidance provided by the infinite Divine through Revelation can, of course, help mankind in achieving balance between the super-sensory, rational and sensory realities. The super-sensory aspect is understood purely in the light and language of the Divine Guidance. The noble rational realities—those rational realities

which are not in conflict with clear and definite provisions of Divine Guidance are recognized. The sensory realities are accepted and the technological, economic and political techniques of this field are adopted to make the media for the materialization and objectification of the Divinely Revealed meanings-values-patterns. This three-dimensional conception of the ultimate reality and the supersystem built upon it is described as 'Integral'. Strictly speaking Islam is its only example. The three-dimensional working of the system of Islam is its living evidence. The Qur'ān witnesses such a nature of the Islamic system.

وَكَذٰلِكَ جَعَلْنٰكُمْ أُمَّةً وَّسَطًا لِّتَكُوْنُوْا شُهَدَآءَ عَلَى النَّاسِ ۔ (البقرة: ۱۴۳)

"And thus We have made you the nation balanced on the middle path; so that you may stand witness over the people." (Q. 2 : 143)

Pitrim A. Sorokin, in his scholarly book *Social and Cultural Dynamics* which comprises of four volumes, has cited the European culture starting with the end of Dark Age and concluding with the beginning of the Modern Age as an instance of the integral supersystem. But this is a rough instance. That span of the European culture was neither thoroughly differentiated nor strictly harmonious and contained a lot of congeries. Anyhow, the author has admitted that Islam fits well in this category.

Primary Unit of Social System

When it is claimed that everything is provided and explained by Islam; it is a comprehensive system, does it mean that every geographical, biological, chemical and physical facts have been discussed therein? No, certainly not. Every subject has to fix and define its basic unit which is considered to have an independent existence in the system of that subject. In Chemistry molecule is the basic unit while in Physics and Biology atom and gene are respectively the primary units. Similarly there

must be a primary unit of social system. Only then it is possible to discuss the socio-cultural phenomena including that of change. When we use the word 'thing' in the context of a social system, we always mean the primary unit of social system.

'Meaningful social Interaction' is the unit of a social system. The most generic model of any socio-cultural phenomenon is the meaningful or symbolic interactian of two or more individuals. By 'interaction' is meant any event by which one party tangibly influences the overt actions or the state of mind of the other. Meanings and values are superimposed upon the bio-physical properties of interacting persons. In the domain of the rights of man (حقوق العباد) both the interacting parties are human beings; but in case of rights of God (حقوق الله) the other party is God. There may be meaningless interaction. For instance, a person while sitting among the friends may aimlessly go on moving his leg. In the absence of tangible influence on the overt action or the state of mind of the others, no socio-cultural phenomena are possible. The super-organics as personality, social-system and cultural system are founded and developed exclusively on the meaningfully interacting human beings and are the product of their such interaction. Parsons says :—

> "The interaction of ego (active person) and alter (passive person) makes a social-system. In interaction we find the basic process which provides the seed of what we call on human level personality and social-system. Interaction of elementary orientation of actions on the human level involves true symbolization. A symbolic system of meanings is an element of order imposed as it were on a realistic situation."[1]

Law and General Change

By general change we mean the change at collective level : the change which a social-system undergoes as a whole. This is in contradistinction to the change at the level of individuals.

1. Talcott Parsons ; *Social System*, pp. 10-11.

Much has been written on this by the Muslim as well as the Western scholars. Ibn Khaldūn is admittedly the first person who investigated the totality of the repeated basic processes taking place in the course of organized groups. The attention of the scholars engaged in this subject has been concentrated on the study of socio-cultural processes and dynamic relationships which are either constant, appearing whenever and wheresoever a certain class of socio-cultural phenomena are given, or are repeated in space, time or both, or in the form of more or less uniform rhythms, fluctuations, oscillations, cycles and their periodicities. In the words of Dr. Martindale :

> "While the social behavioristic theory of *social and culture change* accepts some changes as semilinear, some as random and accidental, it places particular importance on those social and cultural changes which are semicyclical in nature. The formation and destructions of communities and civilizations are semicyclical in nature. The study of these types of changes holds out a specical value of supplying a recurrent subject-matter for the discovery of laws of social and cultural change."[1]

Every socio-cultural phenomenon changes from something to something. This 'from—to', from a state A to a state B is the direction of change. There are three main patterns of direction: linear, cyclical and variably recurrent. The variably or creatively recurrent pattern comprises in itself of a combination of linear and relatively cyclical directions. In part it may have a linear link, but its direction is changed in the next link. It contains in itself a rhythmic repetition, of some relative cycles. These cycles are never identical, nor do they return to their previous position. Each cycle is an ever new variation of the previous cycle, or, more exactly, rhythm or oscillation.[2]

The general pattern of the socio-cultural change is that of increasingly varying recurrent processes. This means :

(*i*) identically recurrent socio-cultural processes are im-

1. *Social life*, p. 31-32.
2. Sorokin, P.A., *Sociological Theories of today*, p. 131.

possible;

(*ii*) eternally linear socio-cultural processes are also impossible;

(*iii*) but a linear trend of various durations—limited in time—is to be expected and is factully found in almost all socio-cultural processes;

(*iv*) Thus history pretending not to repeat, repeats itself.

'Incessant variation of the main recurrent themes' is the only valid formula of the social change. One recurrent theme or persistent pattern of social change has been generalized by the modern sociologists on the basis of empirical data available from the history and the study of developed and underdeveloped societies. The generalization or theory or law relates to the requirments that a social system must meet to keep its equilibrium, to survive and to continue its existence.

Talcott Parson's recent essay, *Evolutionary Universals in Society*, and R. N. Bellah's paper, *Religious Evolution*[1] enumerate the capabilitis which a social system must have in order to increase its adaptive capacity, to pass from the primitive social conditions to those of archaic civilizations, and to move forward on the way of a super modern civilization. Such capabilities or new developments or prerequisites are called by Parsons 'Universals'. They are the innovations endowing their possessors (respective societies) with a very substantial increase in generalized adaptive capacity. So substantial that societies lacking them are disadvantaged in the major area in which natural selection operates. He indicates four required universals necessary for a progressive transaction from an animal to a truly human society: religion, communication with language, kinship organization based on incest taboos, and technology. For a society to pass from primitive conditions to the level of archaic civilizations, two more prerequisites are

1. Both published in *American Sociological Review*, June 1964.

added: the development of 'social stratification' and 'patterns of cultural legitimation'. To pass from the archaic stage to the supermodern, a society must have bureaucratic organization of collective good attainment, money and market systems, a generalized universalistic legal system and a democratic association with elective leadership.

This is the law, recurrent theme or consistent pattern of development which is observed by every social system as a whole, collectively or in general. Has Islamic system got capacity to provide these prerequisites to the society which practises Islam and wants to travel all the stages of supermodern civilization? The answer is assertively in the affirmative. The Islamic system enables to keep pace with all the stages of development in the following ways:

1. Evolutionary Universals

It provides all the six evolutionary 'Universals' enumerated by Parsons, which are required by a society to become civilized. It gives a self-sufficient belief system, it possesses comprehensive kinship organization based on incest taboo. As far as technology is concerned it belongs to the category of integral super-system. It recognises and accepts the sensate realities. It encourages to collect information about the non-human world:

سَنُرِيهِمْ آيَاتِنَا فِي الْآفَاقِ وَفِي أَنْفُسِهِمْ۔ (فصلت : ٥٣)

"Soon will We show them Our signs in the regions (of the earth) and in their own souls." (Q. 41 : 53)

The patterns of using, maintaining and losing the technological material for the sake of objectifying and materializing the meanings-values, have been precisely defined. Patterns of cultural legitimation have been discussed in detail and have been systematically differentiated. Every situation has been defined in definite and clear terms ; who should do what, with whom and under what circumstances? Further, the behaviou-

patterns have been stratified in the vertical manner. They have been classified as obligatory, recommended, etc.

The system is quite capable of maintaining its equilibrium till the super-modern stage of a society. The Holy Prophet (peace be upon him) and the righteous Caliphs organized the bureaucracy of civil servants and laid down procedure for the bureaucratic administration. The famous concept of *Maṣāleh al-Mursalah* is utilized for this purpose. Every aspect of mercantile law, general contracts, partnership, sale of goods, bills of exchange etc. has been completely covered. Exhausive principles of running the Government on consultative pattern with the help of elective leadership have been given.

Ibn Taimiyā has written a complete book on the exhaustive and through nature of Islamic system. The name of the book is *Ma'ārij al-Wuṣūl* (معارج الوصول). He has devouted a separate chapter to prove that the principles and details regarding every walk of human life have been given by the Prophet (peace be upon him). The title of the chapter is :

فصل فی ان رسول الله صلی الله علیه وسلم بین الدین اصوله و فروعه باطنه و ظاهره علمه و عمله فان هذا الاصول هو اصل اصول العلم و الایمان و کل من کان اعظم اعتصا ما بهذا الاصل کان اولی بالحق علماً و عملاً

"Chapter to discuss that the Prophet (peace be upon him) described all the principles and details of religion, its latent and its manifest, its knowledge and its practice ; for this is the basic tenet of knowledge and faith, and whoever has the greatest attachment with this basis is nearest to the truth."

He says in this chapter :

و اکثر المتاخرین الذین لم یعرفوا ذالک فطلبو الحکم مما اعتقدوه من اجماع او قیاس و من المتاخرین ان الاجماع مستند معظم الشریعة فقد اخبر عن حاله فانه تنقص معرفته بالکتاب و السنة احتاج الی ذالک و هذا کقولهم ان اکثر الحوادث یحتاج فیها الی القیاس لعدم

دلالة النصوص عليها فانما هذا قول من لا معرفة له بالكتاب والسنة و دلالتها على الاحكام و قد قال الامام احمد رضى الله عنه انه ما من مسئلة الا و قد تكلم فيها الصحابة او فى نظيرها فانه لما فتحت البلاد و انتشر الاسلام حدثت جميع اجناس الاعمال فتكاموا فيها بالكتاب و السنة ـ

(معارج الوصول ص ٢١٣)

"And many of those who came afterwards and could not understand it properly seek lagal basis from *Ijmā'* and *Qiyas*. Whoever believes that *Ijmā'* has got an independent position in the *Shari'ah* his understanding of the Qur'ān and the *Sunnah* is faulty. It is like saying that in most of the circumstances in which *Qiyas* is resorted to, the texts of *Shari'ah* (نصوص شرعيه) do not provide any guidance. This can be said by a person who does not know anything about the Book, the *Sunnah* and the matters for which they provide guidance. Imam Ahmed bin Hanbal has said that there is no problematic situation which itself directly or its similitude, has not been discussed by the Companions of the Prophet (peace be upon him). When the new territories were conquered and Islam spread over there, every kind of situation arose and was met by the Companions in the light of the arguments from the Qur'ān and the *Sunnah*."[1]

2. Means-End Schema (سد الذرائع و فتح الذرائع)

Islamic system is a fully integrated whole. All of its components are mutually adjusted and in a state of perfect harmony. This is the characteristic of every organized system as discussed earlier. The interdependence of the parts or the instutitions tends to remain in a state of equilibrium. It is written in the Qur'ān:

لَقَدْ كَانَ لَكُمْ فِي رَسُولِ اللَّهِ أُسْوَةٌ حَسَنَةٌ ـ (الاحزاب: ٢١)

"You have got in the Prophet (peace be upon him) a beautiful Model of behaviour." (Q. 33 : 21)

1. Ibn Taimiyā: *Ma'ārij al-Wusūl*, p. 213.

It is evident that something beautiful is necessarily well adjusted, harmonious and systematic. Pattern itself means well-knit and well-arranged standard. The Qur'ān again says:

وَلَوْ كَانَ مِنْ عِنْدِ غَيْرِ اللّٰهِ لَوَجَدُوْا فِيْهِ اخْتِلَافًا كَثِيْرًا (النساء: ٨٢)

"And if it were revealed by somebody other than God, they would have found in it a lot of conflicts."
(Q. 4 : 82)

The absence of conflicts which has been emphasised by God implies that Islamic system is completely integrated and perfectly harmonious.

If one part of the system is adversely affected, the whole system is upset. Conversely, if one component is suitably mobilized the whole system's equilibrium is reinforced. This method of exerting effort is called closing and opening of gate of means (سدباب الذرائع و فتح باب الذرائع) and often mentioned as closing of the means (سد الذرائع). This can be put in more precise words of current terminology as 'means-end schema'. Under the changing socio-cultural conditions it functions in the following manner:

(*a*) In the non-material aspect of culture, the more efficient and up-to-date techniques of politics and economics are substituted for the ones which have previously been used to objectify and materialize the meanings-values-patterns of the system. Techniques are never end, but means for the attainment of certain purposes, and will be substituted by the more appropriate ones. For instance, in a society which is comparatively simple and people have mostly personal and informal relationships, the leadership is elected by getting together, discussion and open voting. But when the society becomes complex and dominated by secondary and formal relationships, the techniques of voting by secret ballots may be adopted.

(*b*) The technology and physical materials are always used as media and vehicles to objectify and materialize the meanings-values-patterns. These, too, are simply the means and not the end. This is why these are always inherently permitted (مباح) and never obligitory (واجب).

Technological elements and techniques have not been made the concern of right or wrong. They have been left at the disposal of the people to choose the best out of them according to the time and the occasion. The basic presumption in their case is that of permission (اباحت). The famous legal maxim (الاصل فی الاشیاء اباحة) means that the basic presumption in the case of things is permission. It may be noted down that the presumption of permission is with things (اشیاء) and not with social actions (افعال). Things mean the meterial objects and techniques which are basically permitted to be selected according to the option of the people unless something is specifically prohibited. Sometimes things are confused with social actions, but it should be noted that basic presumption in case of actions is the provisions of the *Shari'ah* and not the freedom or permission (اباحت). Every social action is end in itself. The presumption of permission or freedom in case of actions amounts to the dangerous belief that the provisions of the *Shari'ah* are not comprehensive. Ibn Taimiyā while confronting with such attitude, writes:

ولا یکون فی الدین واجباً الا ما اوجبه صلی الله علیه وسلم
ولا حراماً الا ما حرمه ولا مستحباً الا ما احبه ولا مکروهاً
الا ما کرهه ولا مباحاً الا ما اباحه

(قاعدة جلیله فی التوسل و الوسیله ص ۹۹)

'In the *Shari'ah* no action is obligatory unless it is made to be so by the Prophet (peace be upon him). Similarly no action is prohibited, desirable, undesirable or permissible unless declared by him (peace be upon

him)."[1]

And he writes in another book:

ولكن الدليل الجامع هو الا عتصام بالكتاب و السنة

(الرساله فى السماع و الرقص ص ۱۷۴)

"And the basic and comprehensice presumption is reliance on the provisions of the Qur'ān and the *Sunnah*."

Ta'līqāt, a commentary on *Manār* goes to the extent:

الاصل فى الافعال التحريم و هو مذهب على رضى الله عنه و ائمة اهل البيت و مذهب الكوفيين منهم ابو حنيفه رحمه الله

(تعليقات شرح منار ص ۴۷)

"According to 'Alī, Imams of the House of the Prophet (peace be upon him) and people of Kūfā including Abū Hanifā, the basic presumption in the actions is prohibition (unless an action is expressly permitted, or made obligatory)."

Ghazālī says:

الصحيح ان الاستدلال المرسل فى الشرع لا يتصور حتى يتكلم فيه بنفى او ثبات

(المنخول ص ۱۳۲)

"And the right version is that an argument without support from the text in the negative or positive is unimaginable in the *Shari'ah*."[2]

It is never advisable to stick to a particular type of techn logy. More efficient must substitute the less efficient. At t occasion of the Battle of *Khandaq* (trenches), the Prophet (pea be upon him) adopted without any hesitation, the Irania technique of digging the ditch. The speedy means of con munications, effective weapons, efficient machinery, etc. a

1. Ibn Taimiyā: *Al-Qā'idat al-Jalīlah*, p. 99.
2. Ghazālī: *Al-Mankhūl*, p. 132.

lways recommeneded to be substituted for the old ones. This s in the interest of maintaining equilibrium of the system. If he change is not in togetherness, the system will start suffering rom cultural lag and the integration will be disturbed. The alance will shift to the 'ideational' side of the super-system. ut one thing is very important. As the old technology must ot be taken as end in itself, the new technology must also ot be taken as that. It should always be used as means to bjectify the meanings-values in the context of the integral upersystem. Otherwise the balance is shifted to the side of sensate' supersystem, and the entire synchronism will be isrupted.

By providing all the essentials of a supermodern system nd by making material and non-material techniques as the neans, the legal system of Islam, therefore, maintains equilibrium with the social change at a collective level.

Law and Specific Change

Roscoe Pound's paradox, 'Law must be stable and yet it annot stand still', was solved only once in the whole of human istory. The great Prophet of Islam gave the law during the ime span of 23 lunar years and implemented that within the eographical boundaries of the state headed by him. In spite f this the law given by him is universal. Is is independent of he time and space. This is obviously a miracle of the Holy rophet that the law is stable and strictly maintains its identity, et it becomes applicable everywhere and for all times.

Interrelationship between the law and collective or general hange has already been discussed. Much has been written on his point by the Muslim as well as the Western scholars. But he Western scholars have been able to contribute little on the henomenon of change which takes place in a concrete social vent at individual level. As history repeats itself at the collective level, it must do so also at the specific level. What are the resistent themes at specific level? What is the spectrum of

social time? What are time budgets of human behaviour These questions are still parodoxes for the Western world, inspit of the fact that considerable researches have been done on thes points. Even the modern Harvard Intellect has admitted it inability in this field. Talcott Parsons has said in so man words,

> "We simply are not in a position to catch the uniformities of dynamic process in the social system except here and there. We are not in a position to develop a complete dynamic theory in the action field and therefore, the systematization of the theory in the present state of knowledge must be in the structural fundamental terms."[1]

Pitrim Sorokin has enumerated in detail the inabilities o the Western thought. He says:

> "The following questions remain unanswered: how and why do official law-norms emerge? How and why do recommended (مستحب), required (واجب), and prohibited (حرام) relationships arise? How do social groups maintain their integrity and continuity? How do they acquire, exchange and lose their means of subsistence? How and to what extent the freedom of groups and their members fluctuate in time and in social space? To give an adequate explanation of these how's and why's concerning the sociol processes, their differentia specifica, their inter-relationship with one another, their rhythms, functions, causes and consequences, and the mechanisms that control the operation of the each and of the whole ensemble of these processes in maintaining, conditioning and making up the total life course of the whole social system, remains the task of the coming generations of sociologists."[2]

By keeping in view the above comments of Parsons anc Sorokin a Muslim can rightly feel proud of the great jurists of

1. *The Social System*, p. 21.
2. *Sociological Theories of Today*, pp. 588, 589.

Islam. They have discussed all these points at length and have given systematic and elaborate answers to these questions. During the course of discussing how the Islamic Law embraces all the dimensions and applying the legal provisions to current and individual cases, they had to explore the minutest details of the socio-cultural phenomena. Side by side with the interpretation of the basic categories of cognition, they showed that these are not only the categories of mind but also socio-cultural categories largely shaped and determined in their meanings and concrete content by the social and cultural conditions of the collective structure of the system. This intensive and revolutionary investigations of the basic categories of the cognition of socio-cultural realities, is the remarkable and matchless contribution of the Muslim jurists to the social thought. Discussion of all the points cannot be within the scope of this book. Ibn-Hummām's *Al-Tahrīr*, Ibn Qayyim's *I'lām al-Muwaqqi'īn* (اعلام الوقعين), Shatibīs *Al-Muwāfaqāt* (الموافقات) etc. contain detailed and comprehensive material on every point. We will discuss the doctrine of *Qiyas* only. Our jurists have discussed the ingredients of every cancrete social event. They have further pointed out which ingredient persists and which changes under different conditions. Thus they successfully apply the theory of repetition of history to every generic unit of socio-cultural phemomena. They go to the extent how one of the changing ingredients is fixed with the persisting ingredient to frame a constant which enables the law to become independent of the time and space; and how the other changing ingredient is left free to give the law capacity to embrace the changed conditions. The discovery and analysis of spectrum of *Qiyas* is, beyond any dobt, the most significant discovery of human mind. The preachers of 'Non-Violence' claim that the discoverers of the principle of 'Non-Violance' were wiser than Newton. It can be more safely said that the jurists who discovered the spectrum of *Qiyas* were more intelligent and wiser than Einstein.

The doctrine of *Qiyas* is based on two presumptions :

(*i*) *The Principle of Cultural Base.* For a legel system to be universal, it is essential that its cultural base—the existing accumulation of materials, knowledge and ideas—is ripe enough to comprise of all the six "Evolutionary Universals' of Parsons. Those are: Religion, Comprehensive language, kinship organization based on incest taboo, technology, patterns of legitimation and social stratification. This presumption holds good in the case of the Islamic system as it contains not only these six universals but also the principales of bureaucratic organization and democratic institutions required by a society to be supermodern.

(*ii*) *The Principle of Continuity.* When a comprehensive cultural base is established, every aspect of the further growth must have its analogous similitude in the already existing accumulation of ideas-norms-technology. This makes possible the overall application of reasoning by analogy (*Qiyās*). This principle of continuity has been summarized by William Ogburn and Meyer Nimkoff in these words:—

"The growth of culture cannot be appreciated without recognizing that every new culture trait is the outgrowth of existing culture traits. Thus the Industrial organizations in the United States, developed out of experience of Trade Unions, as illustrated by the American Federation of labour, that is, the organization of workers by traders. Trade Unions based upon common skills evolved from the guilds in the middle ages, existing long before the modern factory system. The guilds were grouped by the trades based upon skills but were not employee organizations. The trade guilds in turn came from associations of merchants formed in early cities for mutual protection

particularly against aggression by feudal barons and their followers. These several social inventions did not spring full-blown out of nothing. Rather they represent a succession, one growing out of another. The principle of continuity lends significance to the old adage 'there is nothing new under the sun'."[1]

The Spectrum of Qiyās

A behaviour can be the subject-matter of empirical and scientific analysis only if it is expressed in the concrete (معین) form. Expression in abstract (مجرد) terms leads nowhere. For instance the commandment 'Thou shalt not steal' is common to many societies. Yet when the abstract term stealing is applied to concrete situations the guidance of the generalized commandment is not very helpful.

This is why the ideal patterns of behaviour have been given by the Qur'an and the concrete forms by the *Sunnah*. For any future concrete behaviour, analogy can be sought from the ideal pattern in three steps:

(*a*) *Takhrīj Munaṭ* (تخریج مناط) means the derivation of basis or that characteristic of the concrete event which became cause of the legal effect (حکم شرعی) of that event. The finding out of that characteristic is called *Takhrīj Munaṭ*. For instance, wine was prohibited. What is the characteristic (وصف) of wine which became basis (علت) for the legal effect of its prohibition? Its property of causing intoxication is that characteristic. So intoxication is the *Munaṭ*.

(*b*) *Tanqīh Munaṭ* (تنقیح مناط) means the specification of the basis. It often so happens that an event comprises of multitude of such characteristics. It requires the exertion of effort (اجتہاد) to specify that particular characteristic which became the basis or cause of giving

1. *A Handbook of Sociology*, p. 541.

a particular legal effect to the event. That basis is called the real *'illah* and the process of its specification is known as *Tanqīh Munaṭ*. The following instances will illustrate this process:

(*i*) When a wife embraces Islam while her husband continues to remain non-Muslim, the marriage between the two is dissolved. Two characteristics co-exist in this case; Islam of the wife and disbelief of the husband. Which of the two is the real basis of the legal effect of dissolution of marriage? In the light of its context and other legal principles, the effective cause of dissolution is the disbelief of the husband. The husband would have upper hand over the wife and Islam disapproves that it may be dominated by disbelief.

(*ii*) The specification of the effective cause is never arbitrary and personal reasoning is always excluded. It is always based on objective and systematic legal arguments. For instance *A* and *B* jointly buy a slave *C* who happens to be the relative of *A*. The moment the transaction of sale is completed, *C* is set at liberty, and *B* cannot sue *A* for damages (ضمان). What is the effective cause of *A's* not being liable for damages? Abū Hanifā says: "It is an established legal principle that one who buys his relative, cannot keep him as his slave. The latter becomes liberated with the taking effect of the sale. It is also undisputed that liberty cannot be divisible. So if a part of somebody is liberated, it means that whole of him is automatically set at liberty. Now the liability of *A* for damages pre-requires his *mala fides* (عدوان) towards *B*. This is negated by the implied consent of *B* in becoming *A's* partner in this transaction and the ignorance of

Law is no excuse in *Dāral-Islam*."[1]

The real basis of non-liability is therefore, the implied consent of *B*.

(*iii*) There is consensus of opinion among the Muslim Jurists as far as the three-fourth of Islamic Law is concerned.[2] The difference in the rest one-fourth emerges due to different specification of the real basis. A tradition is reported in the famous collection of traditions *Mishkāt-al-Maṣābih*—a woman called Barīrah was under the bond of 'Āishā. She was set free. She was very beautiful but happened to have married a very ugly person. The name of her husband was Qays. One day she was running in the streets of Madina while Qays was following her with tears flowing from his eyes. She came in this condition to the holy Prophet (peace be upon him). The Prophet took pity upon Qays and asked Barīrah to live with him. She enquired whether it was his order. When told that it was not an order but merely a recommendation, she said that she felt like spitting at the ugly face of her husband. At that the Prophet asked her to return to her husband the property given by him and dissolved the marriage. The difference has arisen regarding the specification of effective cause of the legal effect of dissolution of marriage in this concrete event. The Supreme Court of Pakistan in *Khurshid Bibi's* case (PLD 1967 SC 67) has held that the *munāṭ* was the extreme hatred of the wife towards her husband and incompatibility of temperament between the two. The Supreme Court has,

1. *Kashf al-Asrār*, v. 3, pp. 61, 62.
2. Zahid al-kauthari, *Maqālāt*, 86.

therefore, laid down that extreme aversion and incompatibility of temperament can be the ground to seek Khula' (خلع) from a husband. Mullā 'Alī Qarī in *Mirqāt* (مرقاة), a renowned commentary on *Mishkāt*, has expressed a different view. He says that when a woman is liberated from her bond, her status gets raised. She is given an option by Islam to continue her previous marriage or get it dissolved and remarry according to her new status. This woman exercised her option and got the marriage dissolved. The *munaṭ*, in this case according to Mullā Alī Qārī, is freedom of Barīrah and not the disliking for her husband. This is why she asked for dissolution of her marriage after she was let free and not before that.

(*c*) *Tahqīq Munaṭ* (تحقیق مناط)

The literal meaning of this phrase is research of the basis. Newly emerging shapes of the concrete events are observed minutely. Two things are seen:

(*i*) whether the event is similar to that from which the *'illah* was derived or specified?

(*ii*) and whether this shape of the event bears the characteristic which became the *'illah* in that case?

If both the answers are in the affirmative, the same legal effect is given to the new shape of the event. For instance, the echoed voice of the person who led the prayers, invalidated the prayers of the followers. Echo (حکایت صوت) is the affective cause of invalidating the prayers of the followers. In the case of a loud speaker the amplified voice raises a question. Is this voice the real voice of the speaker or the echo of his voice? The careful understanding of the instrument leads to

the inference that this is the real voice and not the echo. The case of the person leading prayers with the help of loud speaker is distinguishable and the prayer will not be invalidated. In this case the characteristic of echo which became *'illah* of the invalidation in the previous case, is absent.

In the present age, there has happened to be a division between the first and the last elements of *Qiyas*. The capacity of grapsing all the three elements is very rare. Those who are capable of deriving and sepecifying the basis of the legal effect are generally incapable of researching the basis (تحقیق مناط). Similarly, those who are in a position to research the basis have no aptitude for the derivation and specification of the basis (تخریج وتنقیح مناط). This state of affairs has practically closed the gate of *Ijtihād*. Theoretically it is not only open but also more facilities are available to the later jurist. Sarakhsī has said in *Mabsūt*:

> "If the upholders of this fiction (the closing of the gate of *Ijtehad*) mean that the previous writers had more facilities, while the later writers had more difficulties in their way, it is non-sense; for it does not require much understanding to see that *Ijtihad* for later doctors is easier than for the earlier doctors. Indeed the commentaries on the Qur'ān and the *Sunnah* have been compiled and multiplied to such an extent that the *Mujtahid* of today has more material for interpretation than he needs."[1]

Dynamics Of Qiyās And Harnessing Of Time And Space

At collective level the Islamic system maintains its identity and continuity. The fluctuations of time and the variations of space have no adverse effect on its integrity. Its super-system has the capability of maintaining its integral character in all times and all places. The balance of the Integral super-system

1. Iqbal: *Reconstruction of Religious Thought in Islam*, p. 178.

may be disturbed in two ways. One is that negative attitude towards worldly pursuit is adopted. The beliefs and ideas are considered to be sufficient. Their expression in the form of action is thought undesirable. Ideational form of the super-system starts emerging. Islam condemns this attitude. The Islamic system lays great emphasis on Action (عمل) *Externalisation* of the beliefs and ideas in the form of patterned behaviour is very essential. The other way of disturbing the balance of an integral super-system is that with the advancement of civilization the technology gets prime importance in the system. *Technicways* become ends in themselves. The strings of the patterns of behaviour defined by the belief system which previously controlled the *technicways*, are cut. The super-system developes the signs of sensate forms (مادیت). Materialistic idealogies give the mental support to rationalise the *technicways* detached from their original mental framework. Such a tedency is strictly prohibited in Islam. The function of the Doctrine of Innovation (بدعت) is to check this tendency. 'Innovation' is defined as any meaningful social interaction which does not have its roots in the form of precedent or analogy in the social system established by the Prophet (peace be upon him)."[1] Innovations are very emphatically condemned by the holy Prophet (peace be upon him). It is said that innovation (بدعت) touches the boundary line of Association (شرک). The Prophet said:

لا یقبل الله لصاحب بدعة صوماً و لا صدقة ولا صلواة ولا حجاً
و لا عمرة و لا جهاداً و لا صرفاً و لا عدلاً یخرج من الاسلام
کما تخرج الشعرة من العجین (ابن ماجه ص ٦)

"God does not accept the innovators' prayers, charity, Hajj, 'Umra, holy war, obligatory worship, nor the recommended worship and he gets out of Islam as a hair comes out of the dough."

1. Ibn Hajar: *Fatḥal-Bārī*, v 4, p. 21 and Nawawī: *Commentary of Muslim*, v. 1, p 285. [والبدعة اصلها ما احدث علی غیر مثال سابق]

By checking the ideational and sensate tendencies, Islamic system manages to maintain the equilibrium of its integral character. This makes the Islamic system immune from changes in time and place at the collective level.

At the individual level, the meaningful social interaction is the generic unit of socio-cultural phenomena. As the generic unit of Physics—atom—has three main components, electorn, proton and neutron, a meaningful social interaction has also got three main components.

(*i*) *Thought* (عقیدہ و نظریہ). This component provides meanings, values, norms, definitions and beliefs to the social interactions. Idea gives meaning and the belief gives its definition and legal effect (حکم شرعی). If a man commits sexual act with a woman against her will and without her consent, the idea gives the meaning that it is rape. The belief gives the legal effct that it is a heinous offence for which the man must be punished very severely. For the sake of this component, the individuals interact. They realise and express it in the course of the social behaviour.

If this component is stripped off, all the phenomena of human interation remain merely biophysical. The purposeful or non-purposeful, harmonious or discordant, loving or hating, moral or immoral, legal or illgal—such socio-cultural characteristics are not inherent in the interacting biophysical individuals, but are superimposed upon them.

(*ii*) *Overt Behaviour.* This is the actions, relations and abstentions of the individuals of a society affecting each other. This should be distinguished from the passive or covert mode of action or abstention. This should actually affect somebody's person, property or state of mind. This is the observable expression of the first component. This may be between two, three

or more individuals, this may be between one and many, this may be conscious or unconscious, habitual or normative, durable or short-lived etc.

(*iii*) *Technicways* (تجربیات). These are skills behind the vehicles and conductors used in the overt behaviour to express the thought complex. Beliefs, ideas and values are immaterial, spaceless, and timeless. They cannot be transmitted directly from mind to mind, except by telepathy and extra-sensory transmission (وحی - کشف), which is very rare. Almost all meaningful interations between the human beings occur through the instrumentality of the sensory vehicles. All material objects and physical, chemical, biological, social processes and forces used to externalise, express, objectfy and socialise the first compotent, are vehicles of meaningful interaction. Without these, even the purely physical interations of human beings would be reduced to a meagre minimum.

These are of numerous and diverse forms, but are mainly divided into physical and symbolic conductors. Physical conductors are those in which the physical qualities of the vehicle are used to modify the state of mind and the overt actions of another. A stone or bullet directed at somebody affects him through its physical properties. Symbolic conductors exert an influence not so much by virtue of their physical properties as by virtue of the symbolic meaning attached to them. A spoken word—abuse— exerts an influence not so much through the physical qualities of sound as through the meaning it conveys.

The interplay of these components makes an individual action. To put in simpler language, these are points of view active expression and non-human agents. When we apply the principle of repetition of history at the individual level, we s

that the component of overt behaviour always persists. In spite of the changes in time and place, overt human behaviour remains similar. Most of the technological advancement of the present civilization has taken place during the twentieth century. The Pakistan Penal Code was drafted in the end of the nineteenth century. Railways, motor-cars, radio, aeroplane etc. were introduced much after that. But all this progress has caused almost no change in any of the definitions of the offences included in the Penal Code. The reason is that the human beings, because of their similarities in nature, instincts, drives, and reflexes have to behave in the like manner. Under all the circumstances, an overt action remains externally the same in all its essentials. However, its meanings (first component) and ways of expression (third component) may be dissimilar. The variability of these two components is caused by the fact that one and the same meaning can be materialized in a variety of material vehicles. The verses of the holy Qur'ān may be conveyed by recitation, printing on paper, recording on phonogram, broadcasting over the radio, etc. Conversely the same material vehicle or conductor may externalise the widest range of meanings, values and norms. The identical currency note may serve now to help the needy, now for paying a debt, now as a bribe and so forth. The characteristic of variability of these two components manifests itself differently in different supersystems. In the 'ideational super-system,' the first component is like an insolvent who has retired from practical life. In 'integral super-system' this is like the principal and the third component of *technicways* is like his agent. In sensate super-system the *technicways* become hostile to their masters. By making the thought constant and invariable, Islam has harnessed time and space. Being revealed by Omniscient God, every aspect of the Islamic thought is the Golden Mean. Change is essential and desirable in the man-made thought-complex because human mind struggles for

centuries guided by grim instincts and puzzled curiosities, then, at last, the truth is loosened. But God-given thought and beliefs are all truth. No corner of reality can remain hidden from the Almightly.

The doctrine of Apostasy (ردة) preserves the purity and maintains the constancy of the Islamic thought. Change, extortion or denial of any belief is Apostasy. Allama Anwar Shah Kashmirī has written a beautiful book *Ikfār al-Mulhidīn* on this doctrine. After reviewing all the relevant literature he defines it as :

"و الايمان عمل من اعمال القلب كما اشار اليه البخارى رحمه الله تعالى يستلزمه ارادة اطاعة الشريعة في كل شئ و قبولها و هذه الارادة شيئ واحد لا ينسحب على كل الشريعة لا يزيد و لا ينقص، فمن حجد شيئا واحدا من الضروريات فقد آمن ببعض الكتاب و كفر ببعضه و هو من الكافرين و ان ركض الى بلاد الصين و اوربا بالنشر مازعمه دينا ورآه الجاهلون خدمة للاسلام . . . . . اهل القبلة في اصطلاح المتكلمين من يصدق بضروريات الدين اى الامور التى علم ثبوتها في الشرع واشتهر فمن انكر شيئا من الضروريات كحدوث العالم و حشر الاجساد و علم الله سبحانه بالجزئيات و فرضية الصلواة و الصوم لم يكن من اهل القبلة ولو كان مجاهدا بالطاعات و معنى عدم تكفير اهل القبلة ان لا يكفر بارتكاب المعاصى و لا بانكار الامور الخفيفة غير المشهورة هذا ما حققه المحققون فا حفظه . . . . . و من انكر شيئا من شرايع الاسلام فقد ابطل قول لا اله الا الله محمد الرسول الله"

(اكفار الملحدين ص ٣٠)

"Belief is one of the acts of heart, as Bukhārī has referred to it. It is the determination to accept and obey

the *Shari'ah* in every respect. The determination is a single entity and covers the whole of *Shari'ah*. Neither anything can be added into it nor anything can be deducted from it. Whoever denies one out of its essential elements is like a person who believes in some parts of the Book and disbelieves the others; and he, no doubt, belongs to the community of the disbelievers. He might have gone to China or Europe to publicise what he considers to be the religion and those who are ignorant think it to be the service of Islam. The People of Qiblā is the term used by the Muslim Theologians for the person who believes in all the essential elements of the Religion. Essential element is the thing which is proved to be belonging to the *Shari'ah* and is famous as such. Whoever disbelieves in any one essential element like the Universe was created out of nothing, Resurrection, Omniscience of God, Obligatory nature of five prayers and fasting etc. does not belong to the People of Qiblā, no matter he is very particular about the morality. The meaning of prohibition from the allegation of infidelity against the People of Qiblā is that one does not become apostate by the commission of sins and by disbelieving in insignificant and infamous elements. This is the finding of the research scholars and it should be noted down. And one who disbelieves in a thing which belongs to *Shari'ah* nullifies his statement that there is no God except Allah and Muhammad (peace be upon him) is His Prophet.

Shah Walī Allah says about the interpretation which amounts to distortion :

ان اعترف به ظاهر لكنه يفسر بعض ماثبت من الدين ضرورة بخلاف مافسره الصحابة والتابعون وا جمعت عليه الامة فهو الزنديق كما اذا اعتراف بان القرآن حق و مافيه من ذكر الجنة والنار حق لكن المراد بالجنة الابتهاج الذى يحصل بسبب الملكات المحموده و المراد بالنار هى الندامة التى تحصل بسبب

الملكات المذمومة و ليس فى الخارج جنة ولا نار فهو زنديق -

(مسوىٰ شرح مؤطا ج ٢ ص ١٠٩)

"And if somebody admits the obvious meaning but interprets and explains something which is proved to be the essential element of Religion, in a manner which is contrary to that of the ompanions of the Prophet (peace be upon him), their Successors and the consensus of the *Ummah*, he is an apostate. For instance, if he says that the Qur'ān is true and what it states about the Heaven and the Hell is true. But the Heaven means the state of pleasure which one gets after performing good deeds, and the meaning of the Fire is the guilty conscience which one feels after wrong deeds, the Heaven and Hell have no objective existence, he is, no doubt, apostate."

Addition into the thought is forbidden by the Doctrine of Innovation (بدعت) and subtraction from it is forbidden by the Doctrine of Apostasy (ردة). The secular thought progresses because it tends to reach the Golden Mean. But the Islamic thought being Divine in origin is already on the Golden Mean. God says :

وَكَذٰلِكَ جَعَلْنٰكُمْ أُمَّةً وَّسَطًا لِّتَكُوْنُوْا شُهَدَآءَ عَلَى النَّاسِ - (البقرة : ١٤٣)

"And thus We have made you the nation balanced on the mide path: so that you may stand witness over the people." (Q. 2 : 143)

And change in it would mean deviation from right path. The reason for giving such a vital importance to the integrity and purity of the thought is that the Unity, Solidarity and Morale of nation depends upon the integrity and purity of its thought. This phenomenon has repeated itself in the history of the nations. Linton says about the society whose thought has disintegrated and is polluted by alien elements:

"The individual has to make constant choices from

among the wealth of culture Alternatives presented to him, and after he has chosen there is no way for him to establish contacts with other individuals whose choices haven been similar. Without the backing of a group of like minded people it is impossible for him to feel absolutely sure about anything, and he falls an easy prey to any sort of high pressure propaganda.

Such a condition is fatal to the effective operation of democratic institutions, since those depend upon a high degree of cultural participation, with the united will and consciousness of social as apart from individual interests which this confers. A low degree of cultural participation makes the rule of organized minorities not only possible but almost a necessity if the society is to be maintained as a functioning entity. Such minorities are capable of concerted action, which the bulk of the population, lacking common attitudes and values which might serve as rallying points, can do nothing against the minority or for themselves.

The situation which confronts us today is not altogether unique. Something much like it existed during the later phases of the Roman Empire. In the cities the old Roman culture, which had served as the unifying code for the empire during its period of growth, passed into solution as it was compelled to compete with new elements down from the diverse cultures of a multitude of subject peoples. When under the later empire, the inflow of wealth began to dwindle, the sufferings of the lower classes became acute but their members did not have enough cultural unity to do anything about it. In spite of half-hearted attempts to right things from above, conditions became increasingly bad until both the society and the culture collapsed.

What the modern world needs far more than improved production methods or even a more equitable distribution of their results is a series of mutually consistent ideas and values in which all its members can participate. Perhaps something of the sort can be developed in them to prevent the collapse which otherwise seems inevitable. If not, another 'Dark Age' is in order, but

we can console ourselves with the knowledge that the darkness is never of very long duration".[1]

By maintaining the integrity and purity of the thought, the first factor is made constant at all places and times. The second factor of behaviour patterns itself remains constant. The third factor is never an independent variable, it always acts as the agent of the first and the second factors. If the thought is comprehensive, only the phenomenon of substitution of old technology by the new takes place and the Islamic thought is comprehensive by all means.

وَنَزَّلْنَا عَلَيْكَ الْكِتَابَ تِبْيَانًا لِّكُلِّ شَيْءٍ ۔ (النحل : ٨٩)

"And We have sent down to you the book which des cribes everything." (Q. 16 : 89)

It is important that a lot of insight and vigilance is required on the part of the Muslims to watch that :

(*i*) None of the elements of their technology becomes agent of some alien ideology or thought. If some element is borrowed from somewhere else, it is adopted in such a way that it adequately becomes the agent of their own thought complex.

(*ii*) Their technology remains most efficient and up-to-date. requisite progress and advancement in the field of technology is the collective obligation (فرض کفایہ) of the Muslims, Ibn Taimiyā's remarkable book—*Al-Hisbah fil Islam* (الحسبہ فی الاسلام) is exclusively on this subject.

The famous maxim that the legal change with the change in time (تبدل الا حکام بتبدل الا زمان) relates only to the *technicways*. Mustafā Zarqā call, such legal rules as *Al-ahkamal-Ijtihadiyah*

1. *The Study of Man* : p 285-286.

min Qiyasīah wa Maṣlihīyah' (الاحكام الاجتهاديه من قياسيه و مصلحيه). The *technicways* which form the bases of this type of legal rules are termed by the Muslim jurists as *'al-'Ādātal-Muhakkamah* (العادات المحكمه), Mustafā Zarqā writes:

"و ليس تبدل الاحكام الا يتبدل الوسائل و الاساليب الموصلة الى غاية الشارع فان تلك الوسائل و الاساليب فى الغالب لم تحددها الشريعة الاسلاميه بل تركها مطلقه لكى يختار منها فى كل زمان ما هو اصلح فى التنظيم نتاجا و انجح فى التقويم علاجا"

(المدخل الفقهى العام ج ٢ ص ٩١٢)

"The legal rules do not change except with the change of the means and the *technicways* which materialize and express the object of the law-giver. The reason is that the *Shari'ah* does not concern itself with the means and the *technicways*, but lets them free so that according to the need of the time, the most efficient for the relative organization and the most effective for the relative arrangement may be adopted."

The famous tradition of pollination (تابير نخل) relates to the *technicways*. The Prophet (peace be upon him) passed by some people who were doing pollination of dates. He just objected to it. They stopped doing so. When they could not reap good produce, they went to him. He said:

انتم اعلم بامور دنياكم (مسلم)

"You are in the better know of the matters concerned with material techniques."

Thus, by making the thought constant and by providing comprehensive and systematic arrangement for the maintenance of the agency characteristics of the *Technicways*, the legal system

of Islam harnesses time and space dimensions of meaningful social action. This is not an ordinary achievement. This is beyond the competence of human mind. This is the sign of of God, the miracle of the holy Prophet (peace be upon him) and the pride of the Muslims.

7

Istehsān

[PREFERABLE JURISTIC INTERPRETATION]

Islam, like scince, is the Deducto-Inductive system. To understand a situation scientifically, a scientist deduces a principle (hypothesis) from the established body of the scientific knowledge (theoretical framework), tests its validity empirically and then generalizes (induction) the objectively verified hypothesis. Sometimes it so happens that two or more mutually inconsistent hypotheses are deducible from the theoretical frame-work. The empirical tests in the field determine which one should be accepted. The research conducted under such circumstances is called the 'Crucial Experiment'. The famous anthropologist professor Malinowski has given detailed description of a 'Crucial Experiment' in his *Argonauts of the Western Pacific.* The anthropologists faced a problem of introducing modern technology in a primitive tribe of New Guinea, Yir Yoront. The theoretical frame-work provided two theories from which two inconsistent principles were derivable. According to Karl Marx, the means of production and production relations determine the ideas and values of a society. On the other hand the German Sociologist Max Weber holds that the values and beliefs determine the economic conditions. To test

the validity of the two conflicting hypotheses, they introduced two items : Steel axe and canoes. The economy of that tribe depended primarily on collecting honey and fishing. For the purposes of collecting honey and cutting the wood, they had a rudimentary tool: stone axe. But they had no device to harness the problem of fishing in the sea. They depended on are swimming which was very dangerous. The people of that tribe accepted steel axe without hesitation. It was a simple substitution of more efficient steel axe in the place of less efficient stone axe. But they refused adamently to accept the canoe although it was repeatedly demonstrated before them that it was a very safe measure for getting to the sea. They were the people of strong convictions and stuck to their refusal for not having any custom or convention allowing the acceptance of canoe. As a result of this experiment, the former hypothesis was rejected and the latter was accepted. The induction of the research validated the rule that the ideology determines the economy and technology.

A Muslim jurist sometimes faces the similar situation. His method is not philosophic but is scientific. In science as well as in Islam there is no such thing as 'a general theory' from which the rules are to be deduced. Uniformities between concrete situations (facts) are discovered and rules are formulated. However, those rules are categorized and abstracted to formulate theories. This is why the scientific and religious theoretical frame-works comprise of multifarious theories which, sometimes, give rise to conflicting principles. When a Muslim jurist find that relative to a certain situation, more than one and mutually inconsistent, rules are derivable from the legal framework, he gives preference to the one which is supported by strong legal arguments from the Qur'ān and the *Sunnah*. This process of juristic preference is termed as *Istehsan* (استحسان). This is juristic because this is not arbitrary and is based on the empirical verification in the light of the objective provisions of the *Shari'ah*.

The term *Istehsan* has been adopted from the Qur'ānic

'erse.[1]

اَلَّذِيْنَ يَسْتَمِعُوْنَ الْقَوْلَ فَيَتَّبِعُوْنَ اَحْسَنَهٗ اُولٰٓئِكَ الَّذِيْنَ هَدٰهُمُ اللّٰهُ وَاُولٰٓئِكَ هُمْ اُولُوا الْاَلْبَابِ۔ (الزمر : ١٨)

"Those who listen to the word, and follow the best (meaning in it). Those are the ones whom Allah guided, and those are the ones endowed with understanding." (Q. 39 : 18).

Sadral-Shari'āh's definition of *Istehsān* is the most comprehensive one. He says:

هو دليل يقابل القياس الجلى

"It is the legal argument contrary to the apparent analogy."[2]

Al-Ijtihād al Istiṣlālī (الاجتهاد الاستصلاحى), which includes *Istehsān* also, is to guard the scientific nature of *ijtehad* against any inference (استنباط) or analogy (قياس) becoming speculative and subjective. It closes the door of independent legislation. All forms of *al-Ijtehād al-Istiṣlāhī* are recognized by the Islamic Jurisprudence as subordinate to the supreme power of the Revelation, and in their nature and scope remain subject to the control of the Qur'ān and the *Sunnah*. The important species of this kind of *Ijtehād* are: *istehsān*, *maṣālih al-mursalah*, *istiṣḥāb*, etc. These are the techniques of re-orientation towards the Revelation. Thereby, the comprehensive character of the *Shari'ah* is maintained, the rules derived by *Qiyās* are saved from rigidity, and the element of juristic liberty is eliminated.

The jurists unanimously accept the validity of *istehsān*. Shāfi'ī apparently seems to be against it. He has devouted a complete chapter on the refutation of *istehsān* (ابطال الاستحسان) in his book *kitāb al-umm*. *Ghazzālī* has also followed Shāfi'ī. The difference is technical and not real. This is a matter of the

1. Zaila'ī: *Naṣb al-Rāyā* v. 1, p. 24.
2. Sadr al-Shari'ā: *Al-Tanqīḥ*, v. 2 p. 81.

past when the terminology was being developed and th definition of *istehsān* was not yet universally accepted Taftazānī says that Shāfi'ī does not oppose Ḥanafī *istehsān* an the *istehsan* which he opposes is rejected by the Ḥanafitie also.[1] The *istehsan* which is refuted by Shāfi'ī is defined b him as giving preference to an interpretation by a juris according to his subjective appreciation. Accordingly, i amounts to laying down the legal provisions without the autho rity of the *Shari'ah* (من استحسن فقد شرع). Such an *istehsān* i not recognised by any of the jurists.[2] The Ḥanafite jurist call this type of interpretation as *Ikhālah* (الخالة) and are deadly apposed to it.[3] The *istehsān* which is recognised by the jurists has also been employed by Shafi'ī. Āmidī has enumerated four instances in which Shāfi'ī has used *istehsān*.[4] Ibn Subkī has stated two more instances.[5]

Keeping in view the type of the authoritative cause (علت مؤثره) on the basis of which a case is made distinguishable from its *prima facie* analogous precedents, and put into another category of the precedents, there are two kinds of *Istehsan* ; preference by juristic analogy (استحسان القیاسی) and preference by legal necessity (استحسان الضرورت).

1. Istehsān-al-Qiyāsī

This is seeking preference between more than one inconsistent analogical deductions on a particular legal problem. Some significant characteristic features call for an argument from the *Shariāh* which enables a jurist to give preference to one analogy over the other.

Illustrations:

(*i*) This is the accepted principle of law that the mort-

1. Taftazānī: *Talwīḥ*, v. 2 p. 81.
2. Ibn Amīr al Hāj: *Al-Taqrīr wa-Tahbīr*, v. 3, p. 223.
3. Ibn Hājib: *Mukhtaṣar*, v. 2, p. 238.
4. Āmidī. *Al-Ihkām*, v. 3, p. 136.
5. Ibn Subkī: *Jam' al-Jawami'* v. 2, p. 354.

gagee is the guarantor of the mortgaged property. In case the mortgaged property is lost or damaged by the mortgagee, the mortgagor is exhonerated from the debt to the extent of the value of the property. If the mortgagor has received the money before the property is damaged, he would have to return the money. Following the line of this principle, if the mortgagee writes off his debt but before he hands over the possession of the mortgaged property, it is damaged, the patent analogy (قیاس ظاهر) of the writing off the debt on the receipt of money requires that the mortgagee should pay the price of the property as he is the guarantor. But the reqirement of *Istehsān* or latent analogy (قیاس خفی) is otherwise. The mortgagor ceases to be the guarantor after writing off his debt. By doing so he dissolves the mortgage for which he is always authorised. After this the mortgaged property becomes a deposit (امانت) in his hands and in the case of deposit he is not liable for compensation unless his negligence is established.

(*ii*) 'A' deposits something with 'B' and goes away. In the absence of 'A', 'C' claims to have power of attorney from 'B' for the recovery of the deposited property. The patent analogy is that 'B' should accept 'C's power of attorney as it is done in the cases of loans that the debtor should accept the power of attorney. But the latent analogy or *Istehsān* requires that 'B' should not honour the power of attorney. There is possibility that 'A' comes and denies 'C's power of attorney. And damages is not the adequate remedy for the loss of deposit although it is so in the case of loan. Deposit is supposed to be returned intact.

(*iii*) 'Umar the Great suspended the punishment of cutting the hands of thieves during the period of severe famine. The patent meaning of the Qur'ānic Injunction is to

cut the hands of the thieves. But the Prophet (peac be upon him) did not cut the hands for the theft of th trifles and the theft of the edibles. Moreover, anothe injunction of the Qur'ān declares a person to be guil less if he happens to have committed some deviatio under the force of extreme and indispensable necessit Considering the latent meaning of the Qur'ānic injun tion of extreme necessity and the exceptions of th Prophet (peace be upon him) to be more relevant an attracted to the situation of the famine, 'Umar suspen ded the punishment.

2. Istehsān-al-Dharūrat

When an object can be achieved in more than one leg ways, and the prevalent way causes serious practical problem its form is changed into another legal way.

Illustrations:

(*i*) According to the prevalent practice, the things i the hands of the artisans (صناع) like the carpente washerman, tailor etc. were considered to be th deposits (امانت). This was the implied nature of th contract between the people and the artisans. In th contract of deposit, if the things deposited are los the depository is not liable for the damages unless hi negligence is proved. The artisans took undue advan tage of the necessary ingredient of negligence an became very careless regarding safety of the things c the people. Their behaviour became a nuisance fo the society. It is permitted by law that the nature c a contract whose terms are implied by virtue of som customary practice (عرف) can be changed by stipula ting express terms or by an enactment. Caliph 'Al availed himself of this alternative legal permission an declared, as head of the state, that the relationshi with the artisans would be that of guarantee instead c

deposit. In the contract of guarantee the artisan becomes liable for damages whether he is negligent or not. He said, "I have done it in the interest of the common good (مصلحت عامہ) of the society and thus the artisans will be set right".[1]

Some jurists maintain that there are two more kinds: *Istehsān-al-Sunnah* and *Istehsānal-Ijmā'*. But this view is not tenable. *Istehsān* presumes two or more valid arguments or rules on a point, out of which one is prefered. The rule which is against the *Sunnah* or the *Ijmā'* cannot be a valid rule. Ibn Taimiyā and Ibn Qayyim have discussed this view in detail. The discussion has been published under the title *Al Qiyās fi Shar'al-Islamī* (القیاس فی الشرع الاسلامی). The jist of their argument is that the rule which is substantiated from the Qur'ān and the *Sunnah*, against that no analogical deduction is conceivable. On the other hand, analogy is based on the Qur'ān and the *Sunnah*, and the analogy which stands on the footing other than this is not Juristic *Qiyas* (قیاس شرعی) but it is analogy based on personal opinion, or *Qiyās-al-Fāsid* (قیاس الفاسد - قیاس بالرائے).

Legal Devices (*Al-Hiyal al-Shar'iyā*) :

The object of legal devices (الحیل الشرعیہ) is to remove practical hardships and to avoid rigidity of the legal provisions of the *Shari'ah*. Muhammad Shaibāni's *Kitāb al-Hiyal* and Khasāf's *Kitab al-Hiyal wal Makharij* indicate that the Hanafite devices are meant to safeguard the legal rights and not to defeat the objects of law.[2] A vendor of land could defeat the right of pre-emption belonging to owner of adjoining property, by making to the purchaser a prior gift of a thin strip of land along the neighbour's border. This destroys the basis of the neighbour's pre-emptive power, since the right of pre-emption arises on transfer by sale and not by way of gift.

1. Abū Zahrā : *Abū Ḥanifā*, p 643.
2. Ibn Taimiyā ; *Ibṭāl al-Istidlāl*, p 94.

The legal devices which are employed to achieve lawful ends by lawful means are recognized by all the schools of law. But the devices which are designed to achieve purposes contrary to the spirit of the *Shari'ah* are unaminiously condemned. The doctrine of *Sadd al-dharāi'* (the stopping of the means) was designed to prevent the use of legal means to achieve illegal end.[1] The legitimate *ḥiyal* are covered by *Istehsān al-Ḍharūrah.*

Maslahah—Basic Good value (مصلحہ)

Islam is the religion of intitutions. Institution is unanimously defind by the sociologists as a 'value content plus the structure or form based thereon'. Content and form are mutually co-related and interdependent. One is flower the other is fragrance. If the form is demolished, the content is distorted. With the confusion in the content, the form is destroyed. So far as the values and the contents are concerned, they belong to the realm of intuitive knowledge of good and evil. The understanding and appreciation of this realm is *'Ilm Asraral-Shari'ah.* Shah Walī Allah uses the word *Asrar* for content and *Shari'ah* for form. Shāfi'ī uses the word *Shari'ah* for institutions.

The best discussion on this subject has been done by Shah Walī Allah in *Ḥujjat Allah al-Bālighah.* He says that the Qur'ān mostly providcs the content or spirit or abstract idea or high moral consideration (مصلحہ). The *Sunnah* describes a definite invariable form. The former is spirit and the latter is body. The object of understanding and appreciating the former (علم اسرار شریعۃ) is to promote strict conformity to the latter, far from generating any contempt for it. The form is the ideal representation (شخوص مثالیہ) and the perfect actualization (وجود شبحی) of the content. It is only the prescription through the *Sunnah* of the dimension embodying the value which constitutes the real grace.[1]

It was the folly of the Mu'tazil'ah to belittle the form. When we admire a piece of art say painting, we concentrate

1. Hujjat-Allah al-Bālighah: v. 1, p. 92.

on the form which the artist has accomplished for the expression of the abstract value of beauty. The moment we turn our gaze away from the *ensemble* of form we are left with a mere piece of paper. No philosophical school of thought can serve the mass of makind in regard to the promotion of the practical virtue. The study of the content can only provide topics and points for discussion to the intellectuals. The uniform pattern of practical virtue for the masses have been provided by the formalities of the *Sunnah* in intimate communion with God. Concrete form of virtue under specific circumstances, where man would feel perplexed and helpless, have been determined by the actual practice of the Prophet (peace be upon him). It is just there where man's natural wisdom wavers and feels at a loss to make a definite choice.[1]

Naturalism, humanism and liberalism are non-religious attidues, not because they deny any moral value of life but because they discount the specific form of virtue as enjoined by religion. A culture can perpetuate till eternity if it can preserve its institutions. The preservation of institutions depends upon the adherence to the specific forms. The life and death of a culture or civilization depends on the distinctive features (شعار) of its specific forms. In the language of Sociology these are termed as Ethos of a culture. The development and the maintenance of Ethos is the *sine qua non* for the life of a culture.

The advocates of the universal truth of religions, which is an intrigue engineered particularly against Islam, emphasize the content which mostly comprises of universal values. Thus, they tend to minimise essential character of the Prophethood of Muhammad (peace be upon him). If their view point is appreciated, the entire superstructure of Islam will fall to the ground. Sociological significance and cultural importance of the distinctive features of the specific form should be fully brought home to them.

1. Yusuf, S. M.: *The Sunnah*, p. 21.

Maslahah and 'Illah—Value and Cause

Shah Walī Allah has pointed out a significant distinctio between *Maslaha*—abstract-value and *'Illah*—cause, of judgment. A person on journey is permitted not to keep fas Consideration for avoidance of hardship is the value conter in this case, and journey is the effective cause. The valu content enhances the quality of an act, the act itself determine the cause specified for it. The important thing is that analog is to be based on *'illah* and not on *Maslahah*. The prescribe form is always indispensable for a value content. No othe form can replace it. Extension of analogy in regard to form is not permissible. The prayer (صلوٰة) has to be in one pre cribed form. Supplication to Allah in any other form is nc permitted. This is for the reason that the value content not measurable (الخفی المشتبہ)[1]. If the value of hardship as deduce from the privilege of the traveller—not to keep fast—is applie to the industrial and other workers, the institution of fastin will rest for those who declare themselves as idlers.

The learned among the Muslims are distinguished by a insight into the value content of an act, the masses are contente with the performance of the forms on the pattern of the *Sunnal* But in no case, after visualizing the *Maslahah* behind th religious injunctions, prescribed forms can be discarded as ir consequential. It requires the Omniscience of God to devis the appropiate forms for the growth and preservations of th ingrained values.

Shah Wali Allah says:

> "Non-conformity to the prescribed formal ways (مناهج) is a great source of evil as much as it involves fault findings with the divinely guided *Sunnah*, the opening of the door of sin, double dealing with the general body of Muslims and harming the clan, the town and the entire community."[2]

1. *Hujjat Allah al-Bālighah* v. 1, p. 102.
2. *Hujjat Allah al-Bālighah* v. 1, p. 90.

Masālih Al-Mursalah (مصالح المرسلہ) (Bye-laws) :

The *Shari'ah* provides law in three forms : in the form of clear texts (نصوص صریحہ), analogous precedents (نظائر), and indications to the right solutions in the form of guiding principles. There is no vacuum in the *Shari'ah.* If there is neither a clear text (نص صریح) nor an analogous precedent (نظیرشرعی), the legislation must be supported by some argument (دلیل شرعی) from the Qur'ān and the *Sunna'h.* The third form of *Shari'ah* laws falls within the domain of *Masālih al-Mursalah.*

An almost similar state of affairs is found in the British legal system;

> "Where there is any authority (text or analogous precedent) on the point, that is to say, where the question is already one of law, the duty of the judge is simply to follow the path so marked out for him; and secondly, that if there is no authority it is his duty to decide it upon principle, that is to say, to formulate some general principle and act upon it."[1]

The rules of action which are detached from the authority of clear text and analogous precedent, may further be of two kinds: those which have support of legal argument from the *Shari'ah,* and those which do not have. The former kind is termed as *bid'at ḥasanah* (بدعت حسنہ) and the latter is called *bid'āt sayi'āh* (بدعت سیئہ).[2] The term *bid'āt hasanah* (Good innovation) is another name of *maṣālih al-mursalah.* The Ḥanafite jurist Zahid al-Kauṯharī holds that this is *isti'mal al-ijtehad* (استعمال الاجتہاد) and is unanimously covered by the concept of *Istehsān.*[3] Accordidg to Abū Zahrā this is *istehsan al-maṣlahā* (استحسان المصلحۃ) and is recognised by not only the Ḥanafites but also by Shāfi'ī.[4] The concept of *maṣālih al- mursalah* is given the name of *gharīb mursal* (غریب مرسل) by Ibn Ḥājib, Ibn Hum-

1. Salmond, *Jurisprudence.* p. 223.
2. Ibn Ḥajar: *Fathal-Būrī,* v. 4, p. 219.
3. Zahid al-kauṯharī, *Fiqh Ahl al-'Irāq,* p. 7.
4. Abū Zahrā, *Shāfi'ī* p. 303.

mām, Baḥr al-'ulūm, etc. It is called *Istiṣlah* (استصلاح) by Al-Ghazālī. Imam al-Haramain calls it *istidlāl* (استدلال) and Zarkashī says it is *istidlāl al-mrusal* (استد لال المرسل).

As such, there is no divergence of opinion regarding the nature and scope of the subject which is being discussed under the heading of *maṣālih al-mursalah.* Shāfi'ī and Ghazālī have severely criticised *maṣalih al-mursalah,* but their definition of this concept is akin to *bid'at sayi'ah* or independent legislation which has not been advocated by any jurist. If *maṣālih al-mursalah* mean the rules of action independent of any foundation in the *Shari'ah,* every jurist including Mālik is opposed to that. Qurṭabī and other Mālikite jurists have stipulated that Mālik used to reject *masālih al-mursalah* in this sense of the term.

Dr. Saīd Ramaḍhān has defined *maṣāliāh al-mursalah* as:

"كل منفعة داخلة فى مقاصد الشارع دون ان يكون لها شاهد بالاعتبار أو الالغاء"

(سعيد رمضان : ضوابط المصلحة ص ٣٣٠)

"The public necessities which fall within the purview of the objects of the Law-Giver, and have got no identical or analogous precedent."[1]

Every injunction of the *Shari'āh* is ladden with some sort of public good or necessity, whether comprehensible or beyond the comprehension of ordinary human mind. In the case of *Qiyas,* the rule of action is supported by precedents. And in the matter of *maṣālih al-mursalah* the rules of action have to be devised, but the object thereof must be species of some object clearly spelled out by the *Shari'ah* laws. This is why Muṣtafā Zarqā says that the concept of *masālih al-mursalah* should be called General Analogy: *al-Qiyās al-'Āam* (القياس العام).[2] And the Ḥanbalite jurists hold that this concept is a kind of *Qiyas.*[3]

1. Saīd Ramaḍhan: *Ḍhawābiṭ al-Maṣlahā,* p. 330.
2. Mustafā Zarqā: *Al Huquq al Madaniya,* v, 1. p. 49.
3. Ma'rūf Dawālibī: *Al-Madkhal,* p. 307.

The etymology of *masālih al-mursalah* makes the concept even more clear. The public good or necessity contained in the laws relating to the domains of *al-Ijtehād al-Bayānī* and Al-*ijtehād al-Qiyāsī* has to be presumed and taken for granted. They are directly related (متصل) to the Divine Revelation, the Qur'ān and the *Sunn'ah*, through the link of clear texts and analogous precedents, respectively. They may be called *maṣālih al-muttaṣilah* (المصالح المتصلة). But the public good embodied in *Al-Ijtehād al-Istiṣlahī* does not reach the Divine Revelation through the usual link of clear text or analogous precedent; but, instead, it is made to reach or is sent to (مرسل) the Divine Revelation by the legal argument that it is the species of a particular object of the Law-Giver (مقاصد الشارع). This nomenclature is on the pattern of a kind of traditions called *ḥadīth al-mursal* (حديث مرسل). *Al-ḥadīth al-muttasil* (حديث متصل) has got a chain of narrators which reaches straight to the Prophet (peace be upon him). *Al-ḥadīth al-mursal* misses the usual direct link of the Companion (صحابي), and the narration is made to reach or is sent to (مرسل) the Prophet (peace be upon him) by the Successor (تابعي) on his own authority without mentioning the name of the Companion.

The *maṣāliḥ al-mursalah* are not addition to the *Shari'ah*, which is prohibited by the doctrine of *bid'ah*. Nor they are arbitrary. The jurist must establish with the help of sound and objective arguments that they are within the purview of a particular object of the *Shari'ah*. There are five principal objects of the *Shari'ah* usually called Five Universals or *kulliyāt al-khams* (كليات الخمس) out of which one must be the genus of the *masālih al-mursalah*. They are: protection of religion (حفظ دين) protection of life (حفظ نفس), protection of reason (حفظ عقل) protection of lineage (حفظ نسب), and protection of property (حفظ مال). Some later jurists (متاخرين) have made the addition of protection of prestige (حفظ عرض).[1] All these objects are estab-

1. Shaukānī : *Irshād al-Faḥūl*, p. 216.

lished by the obligation of *Jihād, Qaṣās,* punishment for *Zinā,* pudishment for drinking wine, punishment for theft and punishment for *Qadhf,* respectively.

The 'theory of *technic-ways*' propounded in the 6th chapter and the concept of by-laws in the British legal system fulfil almost all the requirements of the *maṣāliḥ al-mursalah.* S. A. de Smith says:[1]

> "By-laws must not only be *intera vires* the parent Act, but must also be certain in their terms, not repugnant to other Acts or to the general principles of the common law and not unreasonable."

Only the *Shari'ah* laws have got the privilege of eliminating the motives of the legislator. The bulk of the *Shari'ah* laws belonging to the categories of *ijtehād al-bayānī* and *ijtehād al-qiyāsī* are legislated by God, and God's acts are purposive (غایت) but without motives (غرض).[2] *Maṣāliḥal-mursalah* are in the nature of the delegated legislation with definite guiding principles and defined objects. This eradicates completely the element of personal bias of the legislator. The other legal systems can do so in the field of by-laws, but are helpless in the domain of ordinary laws. Mr. S. A. de smith writes:[3]

> "Yet it is sometimes said that the law is concerned with purposes but not with motives. This view is untenable in so far as motive and purpose share a common area of meaning."

Istiṣḥāb (استصحاب) (Presumptions):

Istiṣḥāb literally means the continuity of the company (صحبت). As a term of the jurisprudence it signifies that a state of affairs is presumed to continue and exists until the contrary is proved.[4]

1. S. A. de Smith : *Judicial Review of Administrative Action,* p, 219.
2. Anwar Shah kashmīrī: *Fayḍh al-Bārī,* v. 1, p. 56.
3. S. A. de Smith: *Judicial Review of Administrative Action,* p. 197.
4. Abū Zahrā: *Usūl al-Fiqh,* p. 283.

Fayzee in *Outlines of Muhammadan Law* and 'Abdur Rahīm in *Muhammadan Jurisprudence* have written that *isteḥsān* and *istiṣlah* as the principles peculiar to Ḥanafī and Mālikī Schools, are in the same level as the principle of *istiṣḥāb* recognized by the Shafi'ī School. This is absolutely incorrect. *Istiṣḥāb* is no way parrallel to the doctrines of *isteḥsān* and *maṣālih al-mursalah.* Professor Coulson also says:[1]

> "*Itiṣḥāb*, however, is merely a natural principle of legal evidence—the presumption that a state of affairs known to exist in the past continues to exist until the contrary is established—and is, as such, endorsed by Islamic Jurisprudence as a whole."

There is difference of opinion among the jurists regarding the operation of the principle of *istiṣḥāb*. The Hanafī and some Shafi'ī jurists are of the view that *istiṣḥāb* cannot establish a right in the court of law. It can only be used in defence against the plaintiff who wants to establish his right. The majority of the Shāfi'ī jursits hold that it can operate both ways: as a sword as well as as a shield.[2] In case of dispute over an immovable property, the defendant in possession will be deemed to be the owner if the plaintiff cannot establish his right of ownership But in a suit of pre-emption the plaintiff cannot assert his ownership only on this basis of his possession. He will have to prove his title of ownership.[3] This is the view of the majority. Shāfi'ī is of the opinion that uninterrupted possession is an argument of ownership for the plaintiff also.[4] However, Ibn Qayyim refuses to attribute this view to Shāfi'ī.[5]

The Orientalists

Professor Coulson in *Conflicts and Tensions in Islamic*

1. Coulson, N. J., *A History of Islamic Law*, p. 92.
2. Āmidī: *Al-Iḥkām*, v. 3, p. 123.
3. Karkhī: Usūl, p. 367.
4. Ibn Amir Al-Hāj, *Al Taqrīr* v. 3, p. 291.
5. Ibn Qayyim: *Il'ām*, v. 2, p. 152.

Jurisprudence has tried to establish that strict conformity with the prescribed forms of the *Shari'ah* amounts to extreme rigidity. To keep pace with the changing circumstances, even the first caliphs of Islam had to discard the prescribed forms at many occasions. To illustrate this thesis he has described the judgment in a case attributed to 'Umar, in which he allegedly violated the prescribed form of the Qur'ān and the *Sunnah*.

In the chapters on Inheritance, the case is known as *Himāriyā*. A woman died leaving behind husband, mother, two real brothers and two uterine brothers. Husband, mother and uterine brothers are the sharers. Real brothers are the residuaries. All the property is inherited by the sharers—husband (1/2), mother (1/6) and uterine brothers (1/3). The real brothers being residuaries are excluded. This is what the principles of inheritance determine, that the uterine brothers inherit but the real brothers do not. He says:

> "'Umar first decided that the golden rule of distribution as enunciated by the Prophet should be applied systematically—the Qur'ānic heirs should take their allotted portions and then the male agnates should take the residue The result was most unfortunate as far as the germane or real brothers were concerned; for nothing remained for them to take as residue—in other words a head-on clash between the old tribal heirs, the germanes, and the new heirs introduced by the Qur'ān, the uterines."
>
> The germane brothers, however, proved to be persistent litigants. On appeal to 'Umar they contended that while they sought no advantage *vis ā vis* the uterines from their agnatic tie through the father of the praepositus, at least they ought not to be penalized because of it and come off worse than the uterines. Did not the deceased, uterine brothers, and themselves all have the same mother—this being the sole ground of the uterines' claim? Why then should not they, as germanes, be allowed to ignore their agnatic tie and, basing their claim on the fact that they had the same

mother, at least stand on a parity with the uterines? 'Umar accepted the validity of this argument, reversed his original decision and ordered that the third of the estate remaining after the claims of the husband and mother were satisfied should go in equal shares to both the uterine and the germane brothers. The name of this case, "the case of the donkey", is derived from the way in which the germane brothers expressed their argument that they should be allowed to waive their agnatic tie and discounting their father, inherit because of their maternal connection. They said, "suppose our father were a donkey of no count, do we not still have the same mother as the deceased?"[1]

Coulson has alleged that 'Umar gave two judgments in the same case. His first judgment was is accordance with the golden rule of inheritence as laid down by the Qur'ān and the *Sunnah*. After realising the awkward situation that the real brothers were being defeated by the uterine brothers, he reviewed his judgment although in doing so he had to violate the Qur'ān.

Coulson has made these observations without having read th entire material on the subject. Although he has written a book on the Muslim Law of Inheritance, yet his knowledge is superficial. He has failed to apply his mind even to the relevant verses of the Qur'ān. His views are wrong for the following reasons.

(*i*) The entire anecdote of the case of Himāriyā is historically unfounded. It has not been reported by the authentic books of tradations. It is incorporated in the books of *fiqh* without any *isnād* thereof. Ibn Taimiyā remarks:

"و اما قول القائل ان اباهم كان حمارا فقد اشتركوا فى الام فقول فاسد حساً و شرعاً" ـ

(مجموع فتاوىٰ ج ٣١ ص ٣٤٠)

"The saying that suppose their father were a donkey,

1. Coulson, N. J., *Conflicts and Tensions in Islamic Jurisprudence, pp.* 5-16.

therefore let them be included due to their common mother, is logically and legally invalid."[1]

(*ii*) According to the Qur'ān and the *Sunnah*, the uterine brothers are not the sharers (اصحاب الفروض). If Coulson and the jurists who hold that the uterine brothers are sharers, had applied their mind fully to the verses (Q. 4:11, 12, 117) of the Qur'ān which deal with inheritance, they would not have declared the uterine brothers as the sharers. Confusion is caused by the term *kalālah* (كلالة) used by the Qur'ān. It means the relatives other than parents and children, like uncle, aunt, brother, sister, etc.[2] In the aforementioned verses, it is the characteristic of the heir and not that of the praepositus *i. e.* the heirs bequeathed by the deceased, other than his parents and children.

Accordingly, the Qur'ānic way of distribution of inheritance in the case of Himāriyā should be: husband (1/2) and mother (1/6) as sharers and the residue of (1/3) will go to to the germane brothers. The uterine brothers stand nowhere.

(*iii*) "Even the facts as they are, have not been correctly stated, by Coulson. According to Coulson 'Umar gave two judgments in the same case. Actually, as the facts go, he gave two judgments in two different but identical cases:

و حكم عمر اول عام فى الفريضة الحمارية بعدم التشريك و فى العام الثانى بالتشريك فى واقعة مثل الاولى

(مجموع فتاوى ابن تيميه ج ١٩ ص ١٢٢)

" 'Umar decided once the case of Himāriyā without including the germane brothers, and the next year he decided another case identical to the previous one and included the germane brothers with the uterine brothers."[3]

1. Ibn Taimiyā: *Majmū' Fatāwā*, v. 31, p. 340.
2. Zamakhsharī: *Kashshāf*; Jaṣṣāṣ Rāzī: *Ahkām al-Qur'ān*; Muslim *Ṣaḥīḥ, bāb mīrāth al-kalālah.*
3. Ibn Taimiyā: *Majmū' Fatāwā*, v. 19, p. 122.

(*iv*) "It is incorrect that 'Umar reversed his earlier judgment. In the view of 'Umar both the judgments may be correct. When he was confronted with his previous jungment, he never disclaimed that, and replied:

فقال ذالک علیٰ ما قضینا و هذا علیٰ ما نقضی

(طحطاوی ج ۴ ص ۳۹۲)

"He said, 'that was what we decided, and this is what we decide'."[1]

'Umar's former judgment is said to be supported by Abū Bakr, Ibn 'Abbās, Abū Ḥanīfā, etc; while the latter is supported by Zaid bin Thābit. This shows that the so called case of Himāriyā admits scope of *ijtehād*. Arguments can be advanced on both the sides. The impression given by Coulson that clear text is on one side and expediency is on the other, is wrong.

The Orientalists usually give some more examples wherein, according to them, the Early Caliphate deviated from the path prescribed by the Qur'ān and the *Sunnah*. Some remarkable Muslim scholars like Mahmasānī have also been influenced by them in this respect. It is unfortunate for them that none of the examples given by them is acceptable to the Islamic History. Rather, these are the examples of worst distortion of the historical facts. A few of these are discussed below.

(*i*) *Distribution of the conquered Lands*

'The Prophet (peace be upon him) distributed the occupied lands of Khayber among the Muslims. But 'Umar deviated from the practice of the Prophet and did not distribute the occupied lands of 'Irāq among the Muslims.'

The fallacy of this example is that the Prophet (peace be upon him) did not always distribute the occupied

1. Ṭaḥṭāwī: v. 4, p. 392.

lands among the Muslims. For instance, the land of Mecca was not distributed by the Prophet among the Muslims although it was also occupied by force. The practice of the Prophet, therefore, is that it is in the discretion of the head of the state to distribute the land or not, according to the circumstances: and 'Umar's act is in strict conformity with that.[1] Moreover, 'Umar justified his stand from the Qur'ān also.[2]

(*ii*) *The people with Reconciled Hearts* (مؤلفة القلوب)

'The people whose hearts are inclined towards Islam, have been enumerated by the Qur'ān as one of the beneficiaries of Zakat. 'Umar suspended the share of this category from Zakat on the plea that the value content of their share was to increase the number of the Muslims. When the number of the Muslims had become sufficiently large, the expenditure of Zakat on this category was no more required. In this example, they have attributed to 'Umar a very unbecoming act of confusing the *Maslahah* with the *'Illah*. The jurists are unanimous on this point that the injunctions are conditioned with the *'Illah* and not with the *Maslahah*, and the *'Illah* in this case is the inclination towards Islam while *Maslahah* may be the number of the Muslims.'

The Orientalists and the others who maintain this view have misread the commentary on the Qur'ān by Ibn 'Abbās. The people who were referred to by 'Umar were given help by the Prophet (peace be upon him) from the 1/5th (خمس) of spoils of the Battle of *Ḥunain*. This happened in the 8th year of Hijrā and was never continued by the Prophet. They demanded help from 'Umar out of the *Khums* (1/5th) of the spoils of war, and quoted a precedent of the Prophet.

1. Ibn Taimiyā: *Al Qiyas fi Sarai'-al Islamī*, p. 28.
2. Abū Yusuf: *Kitab al-Kharāj*, p. 81.

'Umar remembered that the precedent of the Prophet was to discontinue their help, so he acted upon that.

The verse of Zakat was revealed in the 9th year of Hijrā and Ibn 'Abbās has quoted this incident to illustrate the people inclined towards Islam. He did not say this as an example of the practice on the verse of Zakat. Some persons have wrongly understood from this that the Prophet (peace be upon him) helped those persons from the funds of Zakat and 'Umar discontinued that.[1]

Shāfi'ī in *Kitāb al-Umm* and Abū Bakr ibn al-'Arabī in *Ahkam al-Qur'ān* vehemently hold that the *'Illah* of spending Zakat on this category is their inclination towards Islam. This expenditure must continue with the presence of the *'Illah*. The Companions of the Prophet continued this practice.

(*iii*) *Sale of the Mothers of Children* (امہات الاولاد)

'The captive girls from whom the children are born, attain the status af *Ummahāt al-Aulād*. They used to be sold during the time of the Prophet, but 'Umar prohibited their sale.'

The Orientalists have misinterpreted the saying of a Companion of the Prophet, Jābir bin 'Abdullah, narrated by Abū Dawud. He says, "We used to sell the mothers of the children during the time of the Prophet (peace be upon him) and Abū Bakr, but 'Umar prohibited us from doing so."

As a matter of fact, the sale of such women was made unlawful by the Prophet himself. There is a tradition which runs as follows:

ایما امۃ ولدت من سیدھا فھی حرۃ اذا مات الا ان یعتقھا قبل موتہ رواہ حاکم و قال ھو صحیح۔

[1] Rāzī, Fakhrud Dīn: *Commentary on the Qur'ān.*

"The slave girl who bears child from her master will be set free with his death. Her liberty during his life-time depends on the acts of the master."[1]

After bearing child, the status of slave girl is raise She cannot be alienated and after the death of t master becomes at liberty. During the life-time of t Prophet, (peace be upon him) the slave girls were le in number. For this reason the injunction of t Prophet was not thoroughly propagated. Due to t lack of the knowledge of true legal position, son people continued this sale. During the time 'Umar, the number of the slave girls increased ar some instances of such sales came to his knowledg At this he strictly prohibited the people from doing s He simply implemented the practice of the Prophe Khattābī while writing commentary on the tradition Jābir says,

يحتمل ان يكون هذ الفعل منهم في زمان النبى صلى الله عليه وسلم و هو لا يشعر بذالک لا نه امر يقع نادراً (معالم السنن)

"It seems that during the times of the Prophet, some Companions might have done so without the knowledge of the Prophet. This happened due to the small number of the *Ummahat al Aulad*."[2]

Flexibility and Rigidity

1. Law becomes rigid if it is not comprehensive. T society faces a deadlock when it faces a situation which is n covered by its legal precedents. The case of the primiti tribe Yir Yoront has been discussed by the anthropologi Malinowski in *Argonauts of the Western Pacific*. They face the problematic situation of dangerous swimming in the s

1. Ḥākim: *Mustadrak*.
2. Khattābī: *Mu'ālim al-Sunan*.

water. They resented from accepting the canoe only for the reason that they did not have any analogous precedent in the body of these customs and traditions. A comprehensive legal system can never be rigid. It can only be unreasonable. The unreasonablenss can be attributed to the thought and preamble and not to the form and body of law. It has been discussed in the chapter on *Qiyas* that the form or body of fact repeats itself and is immune from the changes in time and place. All the changes take place in the fields of preamble (thought) and means of expression (*technicways*). More reasonable thought replaces the unreasonable thought and more efficient technology replaces the less efficient technology. The changes in these two spheres run parallel to each other. Change in technology does not affect thought and change in thought does not affect technology. The technology, in any from, has to be at the service of thought and acts as the medium of its expression.

2. It is exhibiting utter ignorance from the knowledge of social sciences to assert that the presicribed forms can stand in the way of social change. It is thought, values and attitudes which come in conflict with the changing circumstances. A heretic and disbeliever may dare say that the Divinely Ordained Thought is unreasonable and requires change. But a true believer is supposed to harness and control the Universe according to the religious injunctions.

3. There is no doubt that the religious injunctions are for the welfare of the mankind. This, however, does not mean that the religious provisions, if in conflict with the timely thinking of somebody, should be discarded. The dictates of parents and teacher are in the benefit of the child although, due to his immaturity, he may think those to be otherwise. No man is infallible. Throughout the life a wise man continues correcting his past. Finality cannot be attached to any of the human attitudes. All the wisdom lies in submitting completely before Allah and Muhammad (peace be upon him). The

personal inclination (هوى) of somebody may ultimately prove to be contrary to his benefit, but the Beneficence of Allah and the Graciousness of Muhammad (peace be upon him) will always safeguard his interests.

The Qur'ān says:

وَعَسٰٓى اَنْ تَكْرَهُوْا شَيْـًٔا وَّهُوَ خَيْرٌ لَّكُمْ ۚ وَعَسٰٓى اَنْ تُحِبُّوْا شَيْـًٔا وَّهُوَ شَرٌّ لَّكُمْ ۗ

(البقرة: ٢١٦)

"But it is possible that you dislike a thing which is good for you. And that you love a thing which is bad for you. But Allah knoweth and you know not."
(Q. 2 : 216).

4. Law becomes rigid if it is in the form of statutory texts, for they afford no scope for distinguishing the newly emerging situations. Islamic law is mostly in the form of concrete precedents. The distinctive features of the newly emerged cases are distinguished and their legal fate is decided accordingly. Due recognition is given to the distinctive characteristics, and this rules out the possibility of rigidity. Rigidity takes place only if the identical as well as distinguishable cases are treated equally by the statutes. Salmond says:

> "The power of distinguishing is very important, especially for the House of Lords, and more than anything else has enabled the courts in England to preserve the flexibility of the law."[1]

Camparison

Except Professor Fitzgerald, no Orientalist has translated *Istehsan* correctly. They have translated it as Equity. They do this with the motive of importing the idea of deficiency in the domain of Islamic Law. There is a world of difference between the two. In the case of Equity a British Jurist tries

1 Salmond: *Jurisprudence*, p. 224

to fill in the gaps of deficiency in the law. The principle of Equity is based on the pre-sumption that the law has failed to provide the adequate remedy. But in the case of *Istehsān* a Muslim Jurist endeavours to find what the exact law in a particular case is!

A Muslim jurist cannot think, even for a moment that the Islamic Law has ceased to be comprehensive at some stage; or that the Islamic law proved to be unwise or deficient in some cases. This would be finding fault with the Divine Vision of things. Saīd Ramaḍhān writes:

على ان هذا لا يعنى ان المصالح المرسلة مجردة عن اى دليل تستند اليها كما انها مجردة عن اى دليل يلغيها - فلو كانت كذالك لما امكن للمجتهد جعلها دليلا على حكم من احكام الشريعة بحال - اذان احكام الدين كلها داخلة تحت امر الله و نهيه - فكيف يكون مالا صلة له البة بامر الله او نهيه داخلا ضمن احد هما؟

لا جرم اذا ان المصالح المرسلة لا بد ان يكون مستندة الى دليل ما قد اعتبره الشارع غير انه دليل لا يتناول اعيان هذه المصالح بخصوصها و انما يتناول الجنس البعيد لها كجنس خفظ الارواح و العقول والانساب - اى فهو قاصر عن دليل القياس الذى يتناول عن الوصف المناسب بواسطة النص عليه كما فى الوصف المؤثر - او بواسطة جريان حكم الشارع على وقفه كما فى الملائم -

مثال المصلحة المرسلة جمع ابوبكر رضى الله عنه للقران - فليس له اصل يقاس عليه بواسطة وصف مناسب معتبر يجمع بينهما و لكنه داخل ضمن حفظ الدين ' -

(ضوابط المصلحة فى الشريعة الاسلامية : ٢١٧)

"This does not mean that *Masāleh al-Mursalah* are valid without the sanction of some legal argument for

> or against them. If it were so, it would not be possible for a jurist to declare them lawful. When every situation is governed by the injuntions of God—positive and negative, how is it possible that a valid argument exists without its root in the positive or in the negative injunction of God?
>
> It is necessary that the *Masaleh al Mursalah* are supported by the arguments authenticated by the Law-Giver. However, such argument does not derive its force from some concrete precedents, but comes under some general observations like safety of lives, reason and parentage. In any case, it is devoid of analogical deduction which requires concrete characteristic event.
>
> The compilation of the Qur'ān by Abū Bakr is the example of *Maslahat al-Mursalah*. It has no analogous precedent to rely upon. But it comes under the general desirable injunction 'Protection of Religion'."[1]

The concept of *Istehsān* is nearer to the process of *distinguishing* in the British Legal system. While discussing the process of *distinguishing*, Salmond writes:

> "Who is to determine whether a principle thus laid down by a court is unduly wide for the decision of the case? The answer is, the subsequent court before whom the decision is cited as a precedent. In practice, courts do not concede to their predecessors the power of laying down very wide rules; they reserve to themselves the power to narrow such rules by introducing into them particular facts of the precedent case that were treated by the earlier court as irrelevant. This process is known as "distinguishing"."[2]

1. Said Ramadhan: *Dhawabiṭ al-Maṣlaha*, p. 217.
2. Salmond: *Jurisprudence*, p. 224.

8

Custom

Custom (عرف) is the norm or rule of action recognized the society. It is the means by which a group adjusts to environments. The customs of any group depend upon the iations to which it has had to adjust during its history. To extent that these situations are unlike, therefore, the toms of various groups differ. The customs may be rational well as irrational. The elements of custom are: a cons- t way of behaviour, social in character, and of normative ue. By its social character and normativeness, it is distin- shed from a mere habit. custom has also been defined as anctioned habit.' An institution, while being also social l normative, is more impersonal and less spontaneous than tom.

Custom is an important instrument of interpretation. There n ancient dictum *consuetudo est optima legum interpres* which ans that custom is the best interpreter of law. This signi- nce of custom for interpreting law is due to the pheno- non that every law is commonly carried into practice through umber of customs. When the content and sense of law comes obscure, the meaning of the customs from which it ginated, or through which it was applied is a sure guide for interpretation.

To discover the rules of Islamic Law and to interpret ar illustrate their meanings, the custom prevalent during the tin of the revelation is relevant. The Qur'ān says,

وَاَحَلَّ اللّٰهُ الْبَيْعَ وَحَرَّمَ الرِّبٰوا۔ (البقرة : ۲۷۵)

"God has permitted sale and prohibited usury."

(Q. 2 : 275)

To define and explain the concept of sale and usury, or has to consider the practice of the people at the time whe the verse was revealed. Ibn Nujaim says,

العرف الذى تحمل عليه الالفاظ انما هو المقارن السابق دون المتاخر۔

(الاشباه ص ۷۰)

"The relevant custom to interpret the language of law is that which is contemporary to the period of Revelation and not the later one."[1]

The current custom is relevant for the implementatio of law. It has to be studied with due diligence that in wha respect the current usages and practices are similar to thos prevalent at the time of Revelation. For the sake of *Takhr Munāt* (تخریج مناط) and *Tanqīh Munāt* (تنقیح مناط) the custon contemporary to Revelation are relevant, and for the purpos of *Tahqīq Munāt* (تحقیق مناط) the current local customs ar relevant.

The Orientalists

The views of the Orientalists regarding the status c custom in the Islamic Jurisprudence is too unrealistic. This due to their effort to minimise the role of Revelation in th establishment of the legal system of Islam. Sometimes the try to import the legal idea from without—the Roman Law

[1] Ibn Nujaim: *Al-Ashbah*, p. 70.

d sometimes they attempt to show that the Islamic Legal stem was an amended shape of the customary practices of e pagan Arabs. The motive behind this approach is to get me sanctity attached to the ideas and the practices which are en to the Qur'ān and the *Sunnah*.

The Prophet (peace be upon him) had established at adina a new society comprising of the people coming from rious parts of the world like, Mecca, Madina, Abyssinia, an, etc. having different cultural and customary backgrounds. ne members of this new society were equipped with absolutely w and revolutionary ideas. Arnold says:

> "The introduction of Islam into Arab society did not imply merely the sweeping away of a few barbarous and inhuman practices, but a complete reversal of the pre-existing ideas of life."[2]

resumptions

Custom *per se* has got no binding force. However, *'Urf* literally what is known about a thing) or custom operates as a inciple of subsidiary value. For example, the dower payable the wife in a marriage contract, is divided into two parts: one ayable promptly (معجل) and the other deferred (موجل) until, ually, the termination of the marriage. In the absence of stipulation in the contract itself determining the respective oportions of prompt and deferred dower, the allotment would e presumed to be on the basis of local custom. This represents a application of the legal maxim: "Custom ranks as a ipulation" (العرف كالنص).

hange of Legal Effects (تبدل الاحكام):

1. The customary practices which are in the nature of *chnicways* have to change due to the changes of time and place. he legal expositions (applied laws) which employ particular

2. Arnold: *The Preaching of Islam*, p. 42.

technicways have to adjust themselves according to the substitu *technicways*. When the custom of sale by weighing the thi became popular, Abū Yusuf declared lawful the sale of wh against the wheat of equal weight. He did not hold it aga the legal text (نص) for the reason the text which provided sale of wheat by equal measures (بالكيل) was based on cust When the custom of selling the things by measures was repla by the custom of selling the things by weights, the recogni of the latest custom became obligatory (واجب)[1].

2. The legal provisions which are based on symb customs, have to accommodate change when the custom ce to be the symbol of the meaning which became *'illah* of the l provision (ارتفاع الحكم بالارتفاع العلة). In Pakistan, covering head with some cap, etc. is the symbol of showing resp Therefore, the people cover their heads when they say pray In England, the putting off the cap is the symbol of show respect. In that society, covering the head while saying prayers would not be required.

Previous Shari'ās (شرائع قبلنا)

On the question whether the previous revelations authentic for us, there is complete agreement among the mus jurists on three points:

(*i*) If the previous revelations are not narrated in Qur'ān and the *Sunnah*, due to the distortion (يف they are not reliable.[2]

(*ii*) The previous *Shari'ās* which have been repealed our *Shari'ā* are not reliable.[3]

(*iii*) The provisions of the previous *Shari'ās* which h been narrated and approved by our *Shari'ā*, are part and parcel of our *Shari'ā*.

There is, however, divergence of opinion on one poi

1. Ibn al-Humam: *Sharh Fath-al-Qadīr*, v. 6, p. 157.
2. *Nūr-al-Anwār*, v. 2, p. 98.
3. Ali Hisb Allah, *Uṣūl al-Tashrī' al-Islāmī*, p. 59.

The provisions of the previous *Shari'āṣ* which have been narrated by our *Shari'ā* but there is no indication of repeal or approval thereof. The Hanafites, some Mālikites, some Shāfi'ites and some Hanbalite hold them reliable. Shah Walī-Allah does not consider them reliable.[1]

Comparison:

The local customs of England have been incorporated by the judges in the form of the Common Law. Custom is a source of law in the British Jurisprudence. It has got a binding legal force. In the Islamic Jurisprudence, custom is not the source of law. It does not enjoy a binding legal force. The customs contemporary to the revelation of the *Shari'ā* are relevant to the extent of exact interpretation. The prevalent customs are relevant for the proper implementation of the Islamic law.

Any custom, usage or practice contrary to the *Shari'ā* is void, Ibn Taimiyā says:

''ان الانسان ينشاء على دين ابيه او سيده اواهل بلده كما يتبع الطفل فى الدين ابويه و سادته و اهل بلده ثم اذا بلغ فعليه ان يلتزم طاعة الله ورسوله حيث كانت ولايكون ممن اذا قيل لهم : ''ا تبعوا ما انزل الله قالو ابل نتبع ما الفينا عليه آباء نا'' فكل من عدل عن اتباع الكتاب والسنة و طاعة الله ورسوله الى عادته و عادة ابيه و قومه فهومن اهل الجاهلية وكذالك من تبين له مسئلة من مسائل الحق الذى بعث الله به رسوله ثم عدل عنه الى عادته فهو من اهل الذم''

(ابن تيمية : الفتاوى ج ٢ ص ٢٠٢)

"Man starts his religion on the pattern of the religion of his parents or the chief or the people of the community. It is like a child who follows the religion of his parents,

1. Shah Wali-Allah, *Musawwā*, v. 2, p. 106.

his leaders and the people of his locality. Thereafter, when he becomes major, it is obligatory upon him to obey Allah and the Prophet (peace be upon him) in every walk of life; and he should not be one of those whom when said, "Obey what has been enjoined on you by God, they say that they would, instead, obey what they found their forefathers doing that." Therefore, everybody who switches over from the adherence to the Qur'ān and the *Sunnah* and the obedience of God and his Prophet (peace be upon him), to his custom and the customs of his father and his nation, is from amongst the people of Pre-Islamic Age. And similarly, the person on whom the provision of the true *Shari'ā* raised by God and his Prophet (peace be upon him) became evident and then diverted to the custom, he is one of the condemned people."[1]

1. Ibn Taimiyā *Fatāwā*, v. 2, p. 202.

9

Roman Law—A Comparison

Introduction

Two things are the essential pre-requisites for establishing the influence of a system over the other; positive historical proof and absence of significant dissimilarities.

Positive Historical Proof

Due to the similarities of human nature, its drives, instincts and primary needs, the cultural systems all over the world are bound to exhibit some common traits. Mere resemblance between some elements, therefore, is never a relevant evidence to assert the diffusion of those elements from one culture to the other. The modern anthropologists require positive historical proof of the fact of give and take between any two systems. In the absence of that the presumption will be that the alleged similarities were evolved independently. For instance, many societies of the world follow similar kinship patterns although there is not the remotest possibility of any contact between them.

Significant Dissimilarities

While considering the question of influence of one society over the other, independent of the positive historical proof, it is

the distinctive features which count and not the similarities. is a matter of general common sense that the absence of signif cant distinctive features between two or more persons mak the people think that they belong to the common parentag Otherwise, everybody has got two legs, two arms, two eyes an one nose; but these and other similarities are not decisive in th determination of parentage, lineage or even race. Th deciding factor is the presence or absence of significant distin tive features.

Keeping these two principles—one of the nature of dire evidence and the other of circumstancial evidence—we discu the question whether the Islamic Law is indebted to th Roman Law?

The Orientalists

To disprove the Divine foundation of the *Shari'ā*, th Orientalists struggle hard to trace some worldly sources Islamic Law. Goldziher, Von Kremer, Amos, etc. are on th fore-front to argue that much of the Islamic Law was borrowe from the Roman Law. Their arguments do not carry an force and are based merely on biased speculation and trivia similarities between the two systems. It is noteworthy tha most of the alleged similarities pointed out by these so-calle scholars of Islamic Law, are not supported by facts. Subh Mahmasānī has rightly remarked that they did not stud Islamic Jurisprudence thoroughly but were satisfied with superficial treatment of the subject. An analysis of Schacht' article," "Foreign Elements in Ancient Islamic Law" wi demonstrate how shallow their standard of research is!

Schacht says, "There is a maxim in Islamic Law that 'th child belongs to the marriage) bed'. This maxim which wa intended to decide disputes about paternity, has been regarded on insufficient evidence, as an authentic rule of pre-Islami Arab practice, but Goldziher has shown that it had not ye prevailed in the middle Umaiyyad period, say about A.H. 75

In the middle of the second century, it had been put into the mouth of the Prophet, but it is, strictly speaking, incompatible with the Qur'ānic rulings regarding paternity, and in Islamic Law as it exists the maxim, though often quoted, is never taken at its face value. It is likely that the maxim, which agrees neither with old Arab custom nor with the *Korān*, but has its parallel in the Roman legal maxim, penetrated from outside into Islamic discussions, though it did not succeed in modifying positive law."

The complete wording of the tradition is:

الولد للفراش وللعاهر الحجر

"The child belongs to the (marriage) bed, and for the adulterer (punishment) is stoning (to death)."

Schacht deliberately omitted to mention the complete tradition; for the Roman Law does not punish the adulterer with stoning to death—the penalty which is provided in this tradition.

This tradition has been narrated by more than twenty Companions through numerous *isnāds*. It is incredible that they all conspired to forge the tradition and falsely attributed to the Prophet (peace be upon him).

The allegation that this tradition is against the Qur'ān indicates that Schacht did not have the knowledge of the Qur'ānic law of *'iddah* (عدة).

In 8 A.H. at Mecca, after the victory, there arose a dispute of paternity of a child. To demolish the old custom and to promulgate the new law, this maxim was enunciated by the Prophet (peace be upon him).[1]

Historical Link

History does not provide any evidence to the effect that the Muslims borrowed any law from the Roman, Hebrew or Latin

1. Ya'qūbī: *History*, v. 2, p. 61.

systems. The books concerned with every subject, except law, were translated into Arabic. The exhaustive list of the translated books are available, but there is no book concerned with law. The translation of Greek and Persian books on science philosophy, medicine, literature etc. had admittedly influenced the minds of the Muslims. Words were borrowed and introduced into the Arabic language. But none of the Muslim jurists ever paid any heed to the alien legal systems. The reason why they strictly refrained from doing so is their strong conviction that the *Shari'āh* is Divine and is based on the Qur'ān and the *Sunnah*, exclusively. They believed in the perfection and self-sufficiency of their law in every respect. The contemporary rivalries among the great Muslim jurists engineered exaggerated allegations against each other. Books were written in which jurists were subjected to very severe criticism. All that literature is available, but it does not contain allegations against any jurist that he borrowed something from the Roman Law. The matter of borrowing something, from the sources other than the Qur'ān and the *Sunnah*, was so out of question that it was never, even, considered in the legal discussions before the eminent jurists like Abū Hanifā. Mālik, Shafi'ī and Ahmed. They had different seats of learning, yet they are unanimous on the three fourth of the legal provisions. The difference in the remaining one fourth is that of small degrees of desirable and permitted. This can only be due to the fact that the sources were common and those are the Qur'ān and the *Sunnah*.

The Similarities

Von Kremer has pointed out the following similarities between Islamic Law and Roman Law.

(*i*) The maxim that the burden of proof lies on the plaintiff,

(*ii*) The age of majority,

(*iii*) Rules of commercial transactions such as hire, sale etc.

(*iv*) Distinction between sale and barter.

These similarities are not only insignificant but also expose Von Kremer's knowledge of Islamic Law. The maxim that the burden of proof lies on the plaintiff is based on the tradition of the Prophet (peace be upon him) which is older than the Muslim conquest of the territories under Roman Law. The age of majority under Roman Law was 12 years for girls and 14 years for boys. The predominant view in Islam is 15 years. There are some similarities in the general aspects of the contracts of sale and hire. There are, however, significant differences in detailed rules such as the 'Option of Inspection'. In Roman Law sale is the exchange of property for property. In sale, consent is necessary but in barter only performance is sufficient. In Islam consent in both the cases is essential. Barter is only a type of sale.

Impact of Revelation on Roman Law

The above discussion shows that the Orientalists have failed to substantiate even these insignificant similarities. It should, however, be remembered that the influence of Divine Revelation on Roman Law is also an admitted fact. The Christianity diffused into the Roman institutions although Constantine, the great (324-337), tried to maintain separation of religion from politics.[1] Justinian (527-565) was head of the state as well as of the Church. Under these circumstances some similarities between the uncorrupted old editions (Judaism and Christianity), and new edition (Islam) of the Divine Revelation, are bound to exist. The second important factor is that the territories such as Egypt and Syria were under the Roman Rule before their occupation by the Muslims. The customs prevalent in these territories were not purely Roman. They were commercial usages common to all ancient peoples of the Mediterranian. Throughout the history these people have been

1. Baynes and Moss : *Byzantium, An introdnction to East Roman Civilization* (Oxford 1948)—p. 47.

abode of the important civilizations and the most of the great prophets were sent to them. It is, therefore, not a realistic approach to ignore the contributions of the prophets in these societies and claim that the whole life of these societies was moulded by the Roman Rule. On the other hand the Romans themselves had been influenced by these usages and had imported them in their laws under the title *Jus Gentium* to distinguish them from the original Roman Law known as the *Jus Civile*.

The Dissimilarities

The following are the significant differences between the two systems:

(*i*) The Romans had no concept of International Law, while the works of the early Muslims on the International Law are more comprehensive than the most modern treatises on the subject.

(*ii*) The Romans had no Constitutional Law. They had no ideas of the 'Rule of Law', and the 'Government of the People'. Since the time of Agustus (31 B. C.) they had been ruled by Autocracy and dictatorship. The emperor was considered to be infallible and he claimed the divine right of rule from his very birth. His every verdict carried the force of law. He was head of the Church and only his interpretation of religion was the correct one. The treasury was his personal property.

On the contrary, Islam is the complete code of life. Nobody's verdict can have the force of law. All laws have been revealed. The ruler and the ruled are likewise bound to obey the law. The ruler is as fallible as an ordinary citizen of the State. He can be sued in ordinary court of law. He is bound to take the advice of the parliament (شوریٰ) in the affairs of the Government. He has no privileged rights in the state treasury (بیت المال). The expenditure and income of the

state treasury has to be according to the law. He is entitled to his salary like other servants of the State.

(*iii*) The Roman citizens had no Fundamental Rights. The people were at the mercy of the emperor. He could impose any personal or monetary restraint on any citizen. He had unlimited powers of taxation. The persons of the people were subjected to taxes to meet the expenditure of the treasury. At the time of the Muslim advent, the condition of the people under the Roman Rule reached the extent that they were given option either to pay the tax or face death.[1]

In Islam the head of the state has no jurisdiction to impose any tax unless he is authorised by law to do so. Imam Sarakhsī protested against the unlawful taxes imposed on the people by the then head of the State. He was sent to jail where he compiled the renowned book of Islamic Jurisprudence, *Al-Mabsūt* in thirty volumes.

(*iv*) The Roman woman did not have independent right to hold property. She could not deal in her property without the permission of her guardian. In Islamic Law woman has no such disability.

(*v*) Adoption was an accepted institution in the Roman Law. Islam does not recognize it.

(*vi*) The transfer of debt was illegal in Roman Law. In Islam it is permitted (حوالہ).

(*vii*) In Roman Law wills were made for the purpose of appointing the heirs. In Islam bequest in favour of an heir is illegal.

(*viii*) The rules of pre-emption and family 'wakf' have no parallel in Roman law.

(*ix*) The Romans had a general theory of contracts and obligations while in Islam there is no such thing as 'a

1. Norman & Baynes: *The Byzantine Empire* p. 103.

general theory of contracts'. The rules governing the contracts have been induced from numerous concrete cases.

(*x*) In Roman slavery, the choice is between freedom and slavery. The captive would have been a free man if he were not made a slave. In Islamic slavery, the choice is between death and slavery. The prisoner of war would have been killed if he were not made a slave.

(*xi*) "In Islam law had not grown out of the practice of the courts or the remedies therein available—as Roman Law had developed from *actio*, or English Common Law from the writ."[1]

(*xii*) The Romans had no law of Evidence.

(*xiii*) "It is well known that in the Hellenistic environment, the purchase-sale is a real contract, whereas all the Muslim schools are unanimous in considering it a purely 'consensual' contract, and this is not by a return to the origional Roman conception but on the basis of a passage of the Qur'ān."[2]

In the presence of these significant distinguishing features, it is as clear as day that Islamic law is not at all indebted to Roman Law. Its entire edifice has been raised on the foundation of Divine Revelation, exclusively. The delegate of Al-Azhar University to the International Conference on Comparative Law held at the Hague in 1937 convinced the conference to pass a resolution to the effect that Islamic Law is an independent system and has not been borrowed from any other system. It has its own special origins and its own glorious history.

S. V. Fitzgerald, in his article 'The Alleged Debt of Islamic to Roman Law' has acknowledged that it is almost certain that Islamic law was free from the influence of Roman Law.[3]

1 Coulson, N. J.: *A History of Islamic Law*, p. 82.

2. Nallino: *Influence of Roman Law on Muslim Law.*

3. Fitzgerald, S. V. *The Alleged Debt of Islamic to Roman Law,* The Law Quarterly Review, v. 67, Jan. 1951, pp. 81-102.

PART II

LAW

10

Constitutional Law

Introduction

Constitutional Law and Constitution are two different hings. Constitutional Law comprises of the ideology, beliefs, principles and laws which govern the structure and function of a state. Constitution consists of details about the structure and unction of the organs of a state. It is just like the distinction etween Law of contract and a contract. Sometimes some principles of Constitutional Law may also be incorporated in a vritten constitution.

The Islamic Constitutional Law comprises of the Divine Guidance for the structure and function of an Islamic State. The *Shari'ah* is unequivocal and explicit on every aspect of the Constitutional Law and it claims that whatever status is occupied by a member of Islamic Society, his role has been lefined. The Qur'ān says:

لِكُلٍّ جَعَلْنَا مِنْكُمْ شِرْعَةً وَّمِنْهَاجًا ۔ (المائدۃ: ۴۸)

"To each among you have We prescribed a law and an open way." (Q. 5: 48)

Whether a person is an executive head, member of the judiciary or an ordinary citizen, his rights and duties have been laid

down completely and in a most comprehensive manner. However, a Muslim jurist, like a British jurist faces the situation of expounding and explaining the detailed provisions of law mainly from the uncodified material.

The significant and great responsibility was undertaken for the first time by the great jurist Abū Hanifā. Out of his four hundred students—all studying and staying in the hostel adjascent to his house at his expenses—he selected 34 and entrusted this job to them. In his words each one of them was an expert of either of the fields of knowledge, *i.e.*, Arabic grammar, vocabulary, commentary of the Qur'ān the *Sunnah*, Jurisprudence etc. Out of them 26 could be appointed as judges (قاضی), six as jurisconsults (مفتی) and the two—Abū Yusūf and Muhammad Shaibānī could create (استاذ) judges and jurisconsults. The private legislature of such eminent jurists, presided by Abū Hanifā, started this job. Eighty three thousand legal concepts were defined, written and codified. In spite of the fact that Abū Hanifā was performing the role of leader of the opposition of his contemporary Governments, this codification was accepted by the Muslim Society spread from Spain to Sind[1]. These eighty three thousand concepts covered practical as well as fictitious (تقدیری) problems concerned with Constitutional Law, International Law, Penal law, Civil Law, Law of Evidence, Personal Law etc.

The whole superstructure of the Islamic Law of Constitution rests on two foundations: complete rule of law and representative Government. These foundations were laid fourteen centuries before when all around the 'divine right' of kings and 'dynastic rules' prevailed. This surrounding darkness provided abodes for the persons who wanted to deviate from the constitutional provisions. The people belonging to the newly occupied territories were new converts to Islam. They were used to the dynastic rule and arbitrary power. They just could not realize

1. Muwaffaq al-Makkī: *Manāqib*, v. 2, p. 246.

the gravity of the offence of violating the fundamental provisions of complete rule of law and representative government. They accepted the personal verdicts of the executive heads as the lawful commands and submitted to the perpetuations of their dynasties.

The persons well-educated in the Islamic System reacted severely against this despotism. But they had the difficult task of mobilizing the general masses reared in the un-Islamic systems. Imām Hussain laid his life heroically as a protest against the establishment of the dynastic rule in Islam with its seat of Government at Syria, the territory previously under the Roman Empire. It was the result of this strongest protest that the dynastic rule had to give way to the representative government, and 'Umar Bin Abdul-'Azīz became the representative head.

For the last fourteen centuries, the constitutional practice of the Islamic Community has been oscillating between the extreme poles of representative government and the dynastic rules—sometimes the great Muslim Reformers carried the banners of the popular support and sometimes the monarchs succeeded in grinding their axes. This state of affairs is normal with every society. Non-conformity has always been at war with conformity of Law. The establishment of dictatorship does not mean the death of democracy in a society, as long as the democratic forces continue asserting their force. The Islamic constitutional spirit in its ideal form has been working effectively throughout the Islamic History. Many a times it became triumphant and dominated for a sufficiently long time. Ghazālī educated and prepared his pupil Muhammad bin Tumart for establishing the representative Government in Spain which he did successfully. Ṣalah ud-Din Ayyūbī's regime is the ideal period for the rule of Law. He was not the son of Nūr-ud-Din Zangī whom he succeeded. The rule of the Sultanate of Dehlī spread over eight hundred years reflects almost the true picture of Righteous Caliphate. Even, during the time the ideal constitutional spirit remained dominated, its partial achievements

had far-reaching effect on minimising the arbitrary nature of the kingship. Two characteristics are the main features of kingship. Every verdict of the king carries the force of law, and he has absolute rights of ownership over the state treasury. The Muslim kings could never enjoy the whole of such powers. The Sultanate of Turkey was controlled by the constitutional measures to the extent that Sultan Saleem, the third, was impeached by the then Sheikh al-Islam. It is important that Sultan means the provincial head while the central head is called Caliph. Due to the democratic changes in the international scene, the task of the present day Muslim Reformer is comparatively much easier. He cannot realize the difficulties faced by the persons like Abū Hanifā, Ibn Taimiyā and Mujaddid Alf Thānī Sheikh Ahmed Sirhindī.

The Orientalists

Rosenthal in *Political Thought in Mediaeval Islam* and Gibb in his article *Constitutional Organization* in *Law in the Middle East* are of the view that the Constitutional Law of Islam is the product of evolution in the political thought of the Muslim scholars according to the Islamic History. This argument is a blow on the belief that the whole of the Islamic Constitutional Law is derivable from the Qur'ān and the *Sunnah*. The writing of Avicenna, Farābī, Ibn-e-Bājjā and Averroes, no doubt, owe a lot to the historical experience and Greek thought. Their ideas and political philosophies are the blend of Greek and Islamic Ideas, on the nature of ideal State, the duties of the ruler and ruled, and finding in Islamic History parallels to the good and bad states described in the Plato's Republic. They replaced the *nomos* of Plato with the *Shari'ah* of Islam, as the Law to which a ruler and state should conform. These writers were no more than the scholars of Greek thought with the differenee that they were Muslims also. None of the Muslim Jurists ever owned their ideas. They have always been criticised, refuted and condemned in the light of the provision of the *Shari'ah*.

The works of Abū Yusuf and Ibn Taimiyā on the Constitutional Law have the same revelatory basis, in spite of the fact that those were complied in different historical situations. They judge the events of history on the touch-stone of the *Shari'ah* and discard absolutely the moral bankruptcy of subordinating right to might and the principle of utter expedience. The following exposition of the provisions of constitutional law will also show that it was revealed and does not owe anything to the later events.

There is no doubt that some jurists assumed compromising position under the influence of their surroundings. They deviated on some points from the classical Constitutional Theory. But this is not a problem for a student of Constitutional Law. Their views are subjected to critical appreciation and the Constitutional Theory of the Qur'ān and the *Sunnah* prevails. For instance, al-Ash'arī denounces those who hold it right to rise against the rulers wheresoever there may be apparent in them a falling away from right. Hamilton Gibb attributes this development to two causes: the excesses committed by the khawārij and the diffusion of the Persian tradition. Al-Māwardī (d. 1058), while maintaining that the appointment of ruler must be by the consensus of the community, holds the view that the ruler may be elected by an electoral college or he may be nominated by existing ruler without any election. Māwardī had been raised to the office of the Chief Justice and he was sharing the problem of sustaining the power of the centre against the challenge of strong provincial rulers. While departing from the fundamental principle, in this regard, his reliance is on the precedent of nomination of 'Umar by Abū Bakr. But he has wrongly interpreted the precedent. Abū Bakr never imposed his nomination and it was in the nature of his personal proposal[1]. Abū Bakr left the Muslims free to reject

1. Ibn Qutaibā: *Al-Imāmā wa'l-Siyāsā*, p. 25.

the nomination.[1] Ibn Jamā'ā (d. 1333) gave *coup de grace* to the constitutional theory and asserted that it does not matter if the ruler is a usurper or evil doing (فاسق). Nizām-al-Mulk Tūsī in *Siyāsat Nāmā* upholds divine right of kings and hereditary succession. Such views are isolated opinions and do not enjoy the recognition of valid juristic principles. Ibn Khaldūn over emphasizes *'asabiyā* (social solidarity), but he was a historian *cum* sociologist and not a jurist.

II—Sovereignity

The word 'Sovereignty' has been derived from the Latin 'Superanus' which means the supremacy of one over the other. It is used for the highest person that is for a power over which there is no other power. In a state there must be a sovereign power. It does not take orders from an external authority, nor its power is limited or shared by any other authority within its territory. When we say that a state has four elements; people, territory, government and sovereignty or unity, we mean that the people, obey one power only and that their allegiance is not divided. A divided state can in no sense be one and, therefore, is a contradiction in terms. Political Science has attributed certain characteristics to the doctrine of sovereignty. It is comprehensive, permanent, inalienable, indivisible and original.

The European and American scholars assert that these attributes of sovereignty have come to be recognised with the rise of the modern territorial states (وطنیت). During the Renaissance and Reformation periods of European history, the kings of England, France and Spain began to claim that they were sovereign in their own domains. Internally no feudal lord or baron would share power with them and externally they avoided taking orders from the Pope or the Emperor of the Holy Roman Empire. The stand of the national monarchs was supported bv the political philosophers. Jean Bodin of France

1. Syed Qutb; *Al-'Adālat al-Ijtimā'iyā*, p. 177.

and Hobbes of England put forth the complete theory of sovereignty.

These writers ignore the contribution of Islam to the theory of sovereignty as if the civilization of Islam existed in vacuum or in complete isolation from the rest of the world. As a matter of fact the Qur'ān is an encyclopaedia of the theory of sovereignty. The Muslim jurists had already its meaning and had stated it in fullness before Hobbes or Bodin were even born.

The Islamic Concept of Sovereignty

1. *Sovereignty of God.*—In Islam God, and none else is the sovereign. The concept of God's sovereignty over the Universe is accepted all over the world, almost universally. Islam demands that He must also be acknowledged as the Sovereign in moral, social, cultural, economic and political spheres of life. God is the Creator of Universe. He is its Sustainer and Ruler. His will prevails in the cosoms all around. As everybody is governed by His will, only His command should be established and obeyed in human society. He is Sovereign and His will should be the Supreme Law.

The attributes of His Sovereignty are implied in his excellent names, which are innumerable and out of which 99 are famous. *Al-Wāḥid* (الواحد) means the One: *al-Aḥad* (لاحد) means the only One; *al-Ṣamad* (الصمد) means a Being on Whom all depend and He does not depend on any. There is no word in any other language which translates the exact meaning of *al-Ṣamad*. *Nirādhār* (نرادهار) in Sanskrit and Sovereign in English can be nearest alternative words. *Al-Mālik* (المالک) has been translated as Master by 'Abdullah Yusuf 'Alī, the Owner by Pickthall and the Sovereign by 'Abdul Mājid Daryābādī. The best translation of *Mālike Yaumiddīn* (مالک یوم الدین) should be, 'the Sovereign-Juge of the Day of Judgement. Rousseau in the

1. *Strat-un-Nabi*, v. 4, p. 476.

opening paragraph of *Confessions* used the 'Sovereign Judge' for God. *Al-Jabbār* means the Supreme; *al-'Azīz* the Exalted in might; *al-Muhaimin* (المهيمن), the Guardian; *al-Qahhār* (القهار), the Almighty; *al-Qayyūm* (القيوم), the Eternal; *al-badi'*, (البديع) the absolute Originator and *al-Fāṭir* (الفاطر), the Creator. Syed Sulaimān Nadavī has summarized these attributes as follows:—

> "Muhammad (peace be upon him) has manifested the glory of Allah who alone is Mālik from above the sky to beneath the earth; there is none who shares His works, there is none who is a partner in His Sovereignty, not a single particle of creation can go outside His Command. All are weak and He alone is Almighty, all are dependent and He alone is Self-Sufficing. He possesses all the attributes of Godness Glory and Perfection".[1]

This shows that the Sovereignty of God is absolute, all comprehensive, permanent, indivisible, inalienable and original. The Sovereignty of God was explained by the prophet Yusuf to his fellow prisoners in the most eloquent form as under:

> "Verily, I have abandoned the creed of a people who believe not in Allah and are disbelievers in the Hereafter. And I have followed the religion of my forefathers Ibrāhīm Isḥāq and Ya'qūb. It was never for us and to mankind, but most give not thanks. O' my fellow prisoners, are diverse lords better, or Allah the One the Sovereign? (al-Qahhār-translated by Lane in Arabic-English Dictionary as Sovereign Authority.) Those whom you worship beside Him are but names which you have named, you and your forefathers. God has revealed no sanction for them. The authority rests with God alone, Who has commanded you to obey none save Him. This is the right religion but most men know not." (Al-Qur'ān 12; 37-40)

The Hindu concept is that God retired after creating the Universe. According to the Encyclopaedia Britannica, the Hindu view is that He, having performed his legitimate part in the mundane evolution by His original creation of the Universe has retired into the background. The philosophy of modern

political thought is also based on a similar misconception. The Creator has not severed his connection with the Universe after having created it. He still controls its every aspect. All authority and all power rests in His hands. Qur'ān demolishes the foundation of polytheism (شرک), atheism and self-worship. If a man does not accept God as the Creator as well as the Governor and thinks that God has severed His connection with the Universe and has no practical say in its running now, the natural consequence of this concept would be either the arrogance of all authority by man to himself or the acknowledgment of other powers. The Qur'ān has totally banished both the possibilities. Whoever claims partial or total sovereignty, whether for himself, or for any group or organization is working under delusion. The only reasonable course for man is to acknowledge the Creator and the Lord as Deity and object of worship, and as the only Sovereign, Ruler and the King in the political and social meanings of it.

The point of dispute between the prophets and the non-believers has always been that the prophets demanded absolute, complete and exclusive submission to the Sovereignty of God in the social, political, cultural and all other fields. But those in power whether they were the heads of tribes or were the kings and monarchs, refused to forego their authority and acknowledge only that of God. The Pharoah claimed godhead in the sense of political sovereignty. He never meant that he was the creator of the heavens and the earth. He could not also mean that he was the only object of worship, for the Egyptians worshipped a host of deities and Pharoah himself worshipped many a god and owed his exalted position to his being regarded as the descendant of the sun god. He simply wanted to be obeyed as the sovereign king of the people of Egypt. His position was just similar to that of the states which claim legal and political sovereignty for themselves independent of the law of God. In Islam the *de jure* sovereignty vests exclusively in God Who enjoys the Sovereign Prerogative over all creations.

The Qur'ān unequivocally condemns the omissions and deviations from this fundamental tenet. It says:

وَمَنْ لَّمْ يَحْكُمْ بِمَآ اَنْزَلَ اللّٰهُ فَاُولٰٓئِكَ هُمُ الظّٰلِمُوْنَ ۔ (المائدہ : ۴۵)

"And those who do not make their decisions in accordance with that revealed by God are in fact the unjust." (Q. 5: 45)

اِنِ الْحُكْمُ اِلَّا لِلّٰهِ اَمَرَ اَلَّا تَعْبُدُوْٓا اِلَّآ اِيَّاهُ ذٰلِكَ الدِّيْنُ الْقَيِّمُ ۔ (یوسف : ۴۰)

"The command is for none but God. He has commanded that you obey none but Him, that is the right path." (Q. 12: 40)

اِتَّبِعُوْا مَآ اُنْزِلَ اِلَيْكُمْ مِّنْ رَّبِّكُمْ وَلَا تَتَّبِعُوْا مِنْ دُوْنِهٖٓ اَوْلِيَآءَ ۔ (الاعراف : ۳)

"Follow the revelation sent unto you from your lord and not follow the (so-called) guardians other than Him." (Q. 7: 3)

اَمْ لَهُمْ شُرَكٰٓؤُا شَرَعُوْا لَهُمْ مِّنَ الدِّيْنِ مَا لَمْ يَاْذَنْۢ بِهِ اللّٰهُ ۔ (شوریٰ : ۲۱)

"Have they got the associates who legislate for them what has not been revealed by God?" (Q. 42: 21)

2. *Role of the Prophets.*—The prophets are the representatives of political and legal Sovereignty of God. As such, they are entitled to the unqualified obedience by those who accept God as their Sovereign. They are the true agencies through whom the directives of the Almighty are communicated to mankind. They explain practically, demonstrate and lay concrete patterns of behaviour according to the Will of the Sovereign. Obedience to their conduct and submission to their decisions is the obedience of God. It was for this very purpose that the prophets were sent. One who questions or qualifies their obedience, in fact, tries to put limitations on God's Sovereignty and reserv

power for his own will or some other authority. The principle has been repeatedly enunciated in the Qur'ān.

مَا اَرْسَلْنَا مِنْ رَّسُوْلٍ اِلَّا لِيُطَاعَ بِاِذْنِ اللّٰهِ ۔ (النساء : ٦٤)

"Each and every messenger who was sent by Us was sent for the sole purpose that he should be obeyed under the sanction of Allah." (Q. 4: 64)

مَنْ يُّطِعِ الرَّسُوْلَ فَقَدْ اَطَاعَ اللّٰهَ ۔ (النساء : ٨٠)

"He who obeys the messenger, obeys God." (Q. 4: 80)

وَمَا اٰتٰكُمُ الرَّسُوْلُ فَخُذُوْهُ وَمَا نَهٰكُمْ عَنْهُ فَانْتَهُوْا ۔ (الحشر : ٧)

"And take whatsoever the Messenger gives you and abstain from whatsoever he forbids." (Q. 59: 7)

فَلَا وَرَبِّكَ لَا يُؤْمِنُوْنَ حَتّٰى يُحَكِّمُوْكَ فِيْمَا شَجَرَ بَيْنَهُمْ ثُمَّ لَا يَجِدُوْا فِيْٓ اَنْفُسِهِمْ حَرَجًا مِّمَّا قَضَيْتَ وَيُسَلِّمُوْا تَسْلِيْمًا ۔ (النساء : ٦٥)

"Nay, by your Lord. They will not be believers until they accept you as the final arbiter in all their disputes and submit to your decision wholeheartedly." (Q. 4: 65)

وَمَا كَانَ لِمُؤْمِنٍ وَّلَا مُؤْمِنَةٍ اِذَا قَضَى اللّٰهُ وَرَسُوْلُهٗٓ اَمْرًا اَنْ يَّكُوْنَ لَهُمُ الْخِيَرَةُ مِنْ اَمْرِهِمْ وَمَنْ يَّعْصِ اللّٰهَ وَرَسُوْلَهٗ فَقَدْ ضَلَّ ضَلٰلًا مُّبِيْنًا ۔ (الاحزاب : ٣٦)

"It is not for a believing man or a believing woman to have a say in any affair when it has been decided by God and His Messenger. He goes astray manifestly." (Q. 33: 36)

3. *Khilāfah* (خلافة): *The Institution of Government.*—It is inherent in the very conception of sovereignty that the authority of the sovereign power should neither be limited by any power other than its own free will nor bound by any law imposed from outside.

If society acknowledges that the injunctions of God and His Messenger are above question and neither its executive can issue any order nor its legislature can pass any laws, nor its judiciary can give any verdict, except in accordance with the *Shari'ah*, it means that it has surrendered its claim to sovereignty in favour of God and His Messenger. Its position becomes that of an agent or vicegerent of God and His Messenger. The term used by the Qur'ān for this agency is 'Khilāfah', which means that such an agency is not sovereign in itself but is the vicegerent of the *de jure* and *de facto* Sovereign, God Almighty.

In Islam this relationship of the principal (Sovereign) and agent (Khalifā) is not established between God and some individual, family or group; *Khilāfah* vests in the whole muslim community. The Qur'ān says:

وَعَدَ اللّٰهُ الَّذِيْنَ اٰمَنُوْا مِنْكُمْ وَعَمِلُوا الصّٰلِحٰتِ لَيَسْتَخْلِفَنَّهُمْ فِي الْاَرْضِ كَمَا اسْتَخْلَفَ الَّذِيْنَ مِنْ قَبْلِهِمْ۔ (النور : ۵۵)

> "God has promised to those among you who believe in and work righteous deeds, that He will most surely make them His vicegerents in the earth as He had made the like people before them His vicegerents."
>
> (Q. 24: 55)

This verse clearly states that the authority and responsibility of vicegerence vests in the whole muslim community.

After being endowed with the privilege of *Khilāfah*, the object before the muslim community is to establish the Sovereignty of God and eradicate the other so called sovereignties, as they all pretend to impose limitations on the all comprehensive Sovereignty of God and make room for themselves. This is a crime which cannot be permitted in the Kingdom of God—the whole Universe. The only good laws (معروف) are the laws of God. All the rest are bad laws (منکر). The muslim community is under obligation to enforce good laws and prohibit bad

ıws. The Qur'ān says;

كُنْتُمْ خَيْرَ أُمَّةٍ أُخْرِجَتْ لِلنَّاسِ تَأْمُرُونَ بِالْمَعْرُوفِ وَتَنْهَوْنَ عَنِ الْمُنْكَرِ۔
(الحج : ۴۱)

"You are the best people raised for the mankind. You enforce the good and forbid the wrong." (Q. 3: 110)

اَلَّذِيْنَ اِنْ مَّكَّنّٰهُمْ فِي الْاَرْضِ اَقَامُوا الصَّلٰوةَ وَاٰتَوُا الزَّكٰوةَ وَاَمَرُوْا بِالْمَعْرُوْفِ وَنَهَوْا عَنِ الْمُنْكَرِ۔ (الحج : ۴۱)

"(Muslims are) those who if we give them power in the land, establish the system of *Ṣalāt* (worship and prayers) and *Zakāt*, enforce right and forbid wrong."
(Q. 48: 41)

This object cannot be achieved unless political power is aptured. Even if the institution of *Ṣalāt* etc., is established, it ill not amount to the establishment of 'DĪN.' It would only e a partial enforcement of it. The adoption of the laws other ıan the Divine Laws means nothing short of rejection of the Dīn', as such. The Qur'ān says:

قُلْ رَّبِّ اَدْخِلْنِيْ مُدْخَلَ صِدْقٍ وَّاَخْرِجْنِيْ مُخْرَجَ صِدْقٍ وَّاجْعَلْ لِّيْ مِنْ لَّدُنْكَ سُلْطَانًا نَّصِيْرًا۔ (الاسراء : ۸۰)

"Say: O my Lord, let my entry be by the Gate of Truth and Honour; and likewise, my exit be by the Gate of Truth and Honour; and grant me from thy presence a ruling authority to aid me" (Q. 17: 82)

That is, either grant power to me or grant me the assis-ıance of any ruling authority, or state, so that I may with the ɔrce and the resources of the political power establish the overeignty of God and eradicate the rebel sovereigns.

Absolute control over some territory by the muslims is so ssential according to the Qur'ān that wheresoever the word *hilāfah* has been used, it is invariably followed or preceded by

the word *arḍh*, which means land. For instance:

إِنِّي جَاعِلٌ فِي الْأَرْضِ خَلِيفَةً ۔ (بقرہ : ۳۰)

"I am going to create a vicegerent on the earth (فی الارض خلیفة)". (Q. 2: 30)

هُوَ الَّذِي جَعَلَكُمْ خَلَائِفَ فِي الْأَرْضِ ۔ (فاطر: ۳۹)

"And He it is Who made you (His) agents in the earth (خلائف الارض)" (Q. 7: 166)

يَا دَاوُدُ إِنَّا جَعَلْنَاكَ خَلِيفَةً فِي الْأَرْضِ فَاحْكُمْ بَيْنَ النَّاسِ بِالْحَقِّ ۔ (ص: ۲۶)

"O' David. We did indeed make thee a vicegrent on the earth (خلیفه فی الارض), so judge those between men in truth. (Q. 38: 26)

أَمَّنْ يُجِيبُ الْمُضْطَرَّ إِذَا دَعَاهُ وَيَكْشِفُ السُّوءَ وَيَجْعَلُكُمْ خُلَفَاءَ الْأَرْضِ (النمل: ۶۲)

"Who answers the distressed when it calls on Him; and who releaves its sufferings and makes you vicegerent of the earth." (Q. 27: 62)

لَيَسْتَخْلِفَنَّهُمْ فِي الْأَرْضِ ۔ (النور : ۵۵)

"He will certainly make them rulers on the earth." (Q. 24: 55)

The task of establishing the Sovereignty of God and eradicating, the rebel sovereigns (in the terminology of the Qur'ān, *Fitnā* (فتنه) throughout the world requires the multifarious division of labour in the muslim community. Some have to till the soil. Others have to run the factories; and thus contribute towards the common object. The practical expedience requires that the responsibility of running the affairs of the government should be entrusted to the team of the person well versed in the field. A trust is thereby created. The

ɔmmunity is the truster or maker of the contract of trust. he persons at the helm of affairs are the trustees and the tablishment of the Sovereignty of God exclusively is the object the trust. The guiding principles of this trust have been ɔmmunicated in the Qur'ānic verse:

إِنَّ اللَّهَ يَأْمُرُكُمْ أَنْ تُؤَدُّوا الْأَمَانَاتِ إِلَىٰ أَهْلِهَا وَإِذَا حَكَمْتُمْ بَيْنَ النَّاسِ أَنْ تَحْكُمُوا بِالْعَدْلِ إِنَّ اللَّهَ نِعِمَّا يَعِظُكُمْ بِهِ إِنَّ اللَّهَ كَانَ سَمِيعًا بَصِيرًا ۔ (النساء: ٥٨)

"Surely, Allah does command you to make over trusts to those worthy of them, and when you judge between people, you judge with justice. Surely, Allah teaches you what is excellent, surely Allah is seeing, hearing."
(Q. 4: 58)

The verse contains the word *Amānā* in its plural from, and ıus encompasses all its various forms. The author of the nowned commentary *Rūh al-Ma'ānī* says:

"The plural form of the *amānah* (trust) used in the verse comprehends all the obligations of man whether they are obligations towards God or obligations towards fellow beings and this comprehensive connotation has been stressed and confirmed by a larger section of the Companions, for example Ibn 'Abbās, 'Ubaiyy ibn Ka'b, Ibn Mas'ūd, Barā bin 'Āzib, Abū Ja'far, 'Abdullah, etc."

"The second important point in this verse relates to the specification of the address of the command it contains, *viz.*, who are the people meant by 'you' in these words, "Allah doth command you'?. According to the view held by some of the Companions word 'YOU' refers to all muslims irrespective of the distinction of the ruler and the ruled, while others are of the opinion that the command has been specifically addressed to those who might hold offices of the government in an Islamic state Zaid bin Aslam, for instance, holds the latter view which appears more correct because of the fact that the verse mentions the

administration of justice also which obviously is not the function of the common citizen. Moreover, the verse which comes immediately after this begins with the words' "O ye who believe", and is consequently addressed to the general mass of believers. Thus, the contrast between these two forms of addresses also leads us to the conclusion that the verse under reference relates primarily and essentially to officers of the state. In this connection Zaid bin Aslam observes, 'This verse is addressed particularly to *'Ulil Amr* (or men with governmental authority) commanding them to safeguard the rights and interests of the citizens and to establish firmly the observance and practice of Islam in all its aspects.' The concept of *amānah* (trust) covers the principle that the offices should go only to the really deserving."[1]

Whatever be the scope of address in the word 'you' the officers of the state are definitely included in it, according to the consensus of opinion. And the word *Amānah* comprehends within itself all rights and obligations, including those relating to the officers of the state. Having discussed the implications and meanings of the verse, we may state the principles of statecraft contained therein;

(*a*) A contractual relation exists between the muslim community and the body of the government. The community is the maker of the trust, the men in authority are the trustees, the government offices are the trust and the establishment of the exclusive Sovereignty of God is the object of the trust.

(*b*) All properties, treasuries and offices of the state are held purely as trusts by the men in authority who do not possess the right of ownership and the right to operate them and to dispose them off in any way they like, but are duty bound to act according to law.

1. Maḥmūd al-Ālūsī: *Rūh al-Ma'ānī*, v. 5, p. 64.

(*c*) The men in authority being the trustees cannot utilise the authority entrusted to them arbitrarily. They must submit to the Will of God *i.e.*, the *Shari'ah*. Complete rule of law must be ensured in the Islamic State.

(*d*) The authority is entrusted to the heads of the government only for the reason that they are the most competent persons to deliver the goods. This status of trusteeship is given to them only because of their competence. This is not their personal right which may be transferable to their legal heirs after their death. Men come and go but the institution of trust remains. With the demise of one trustee, the contract between him and the community comes to an end. A new contract (*bay'ah*) will be entered into and the next best men will be entrusted with the job. Thus, the government in an Islamic State is completely a representative government.

(*e*) The establishment of this trust is not an end in itself. It is merely a means. The real objective is the establishment of the exclusive Sovereignty of God. If after the appointment as the trustee, the head of the state does not prove to be upto the mark, or develops some habits which are not worthy of his status, or the main objective seems to be hindered because of him, the muslim community can break the contract (*bay'ah*) and impeach him. All the constitutional jurists like Abū Hanifā, Māwardī, Ghazzālī, and Ibn Taimiyā are unanimous on the point that the muslim community has the right of impeachment.

The above features of the Islamic Constitutional Theory e been best summarised by Abū Bakr and 'Umar bin 'Abdul īz after being elected as the Caliphs. Abū Bakr said:

"I have been given authority over you, but I am not the best of you. If I do well, help me; and if I do ill,

then put me right. The weak among you shall be strong in my eyes until I secure his rights, and the strong among you shall be weak in my eyes unless I wrest the right from him. If a people refrain from fighting in the way of God, God will smite them with disgrace. Corruption is never widespread in a people but God brings calamity upon them all. Obey me as long as I obey Allah and his Prophet, and if I disobey them, you owe me no obedience."[1]

Khilāfah was again made the righteous one by 'Umar bi 'Abdul 'Azīz, After his election he gave to the people th following *Khuṭabā* (address):

"O people, after the holy Qur'ān no other book will come from Allah, and after your Prophet (peace be upon him) any other prophet will also not come. I am not a law-maker. I am only an executor of law. I will bring about no new innovations. I will only follow. I am not better than any individual from among you. The only difference is that I carry greater burden of (*Khilāfah*) on my shoulders. Remember, no good can come out by disobeying Allah. O people, obedience must be given to him who obeys Allah. And anyone who disobeys him, he must not be obeyed. Upto the time I obey Allah, obey me; and if I disobey him, then you must not obey me."[2]

In the light of the above discussion, it becomes evident tha the Islamic State is completely the sovereign State in the stri sense of the western terminology. It comprises of all the fou constituent parts of a sovereign state; territory, people, vicege ent government and the *Shari'ah* as the repository of th Sovereignty of God.

The Western Concept of Sovereignty

1. The issue of sovereignty has become so vexed an disputed that many thinkers have even pleaded that the proble is so confusing that it would be better if the political theoris

1. Saeed Ahmad Akbar Ābādī, *Siddīqe Akbar*, p. 92.
2. Ibn Jauzī, *Sīrah 'Umar bin 'Abdul 'Aziz*, p. 31.

liscard it altogther. Not only there are theoretical and logical inomalies but also the development of internationalism seems o have more or less rendered the concept of national overeignty obsolete. The cause of confusion is a fallacy: the olitical philosophers have tried to place the cap of sovereignty n man, a being for whom it was never intended and whom it an never fit.

Jean Bodin is said to be the first to give an analysis of overeignty. During his period (1530-1596) France was a scene f religious wars. He wanted to see unity established under a trong monarch who should be sovereign. Sovereignty to him s the supreme power over citizens and subjects, restrained by aw. But, he says, it is not absolutely unlimited. It is limited y the natural law, the law of nations and fundamental rights. His sovereign being subject to moral and factual limitations, his heory of sovereignty is not a perfect one. It was given the ullest exposition by Hobbes in the 17th century.

Hobbes (1588—1679) had been living in England during he period of civil wars and had seen Charles I beheaded. He, herefore, wanted a strong monarch in his country which could naintain authority and order as against the prevailing anarchy hroughout the country. His book *Leviathan* stood for complete uthoritarianism and absolutism. The sum and substance of is 'social contract' theory is that the foresight of self-preserva- ion faced each individual to get out of the conditions of war nd this could be only done away with by coming together nder some visible power which could keep them in awe ; and he only way to do this was to confer all their power and trength upon one man (or one assembly) that may reduce all heir wills by plurality of vices, into one will. For this pupose, contract was to be made, every man saying to the other, "I uthorise and give up my right of governing myself to this man n the condition that you also give up your right to him and uthorise all his actions in the like manner." The multitude

so united is called a common-wealth, in Latin *Civitas.* T sovereign thus made was to have absolute power and co act arbitrarily. He was not responsible to any authority human or Divine. The contract was made by individu amongst themselves to obey him; and he was not a party the contract. This was the contribution made by Hobb *Leviathan* or the mortal god to whom the people owe their pe and defence. Hobbes does not believe in God and speaks God and His prophets sarcastically.

2. *Lockes' Theory of Sovereignty.*—John Locke (1632—17c has been regarded as the philosopher of constitutional or parl mentary government and whose book *On Civil Government* h been called a gun with two barrels, one directed agai Hobbes absolute dispotism and the other against Rob Filmers' theory of the Divine Rights of Kings. If Hobbe had been regarded as an instrument of enslavement, Lock's boc in the words Professor Laski, was acclaimed as a charter of fr dom.[1] This is why it has been said that the difference betwe the age of Hobbes and of Locke—between the great Rebelli and the Glorious Revolution—is not merely one of about years, it is a difference of civilizations.[2]

In 1688, James II had to fly from England and his pla was occupied by William and Mary. The new rulers agreed reign according the Declaration of Rights which, later o became the Bill of Rights of 1689. The doctrine of Divi hereditary right and absolute royal power was negatived on and for ever by the revolution, and the rule of parliament w definitely established.

Locke has justified the new political scene of England. H also expresses his political ideas through the 'social contra theory', according to which the state of nature is not anarch It is a state of peace, goodwill and mutual assistance. Everyo

1. Laski: *From Locke to Bentham,* p. 236.
2. Ilyās Ahmad, *Sovereignty : Islamic and Western,* p. 126.

was guided by the laws of nature which were the laws of reason guiding every individual to preserve himself as well as the others. But in practice the selfish persons endangered human life and property. The judges could not administer justice in the society due to the lack of a unanimously accepted body of laws. This state of affairs forced the men of the state of nature to transfer their individual power to the community at large. By this social contract among themselves a state was created. The whole community became the repository of the sovereign power in the state. A governmental contract is implied for legislation and administration. It is made clear to the governmental and legislative authority that it is to carry out this work only as a trust on behalf of the people. Then they go to sleep (the sovereign in Locke sleeps). Before that they tell the authority that if it forfeits its trust, they will wake up and exercise their right of revolution. Thus, Locke has given sovereignty to the community at large, and the authority to rule is given to the government as a trust.

Critical Appreciation

Locke has no clear view of the nature and repository of sovereignty. At one place he speaks of the supreme power of the people, at another he says that the supreme power vests in the legislature. The confusion in his theory is due to the absence of any detailed terms and conditions of the contract. In the case of Islam the terms of the trust are the well defined norms of the *Shari'ah*. The violation of the *Shari'ah* decides that the ruling authority has exceeded its jurisdiction. But with Locke there is no standard of determining that the acts of the men in authority are with or without jurisdiction. The search for the terms of the trust has made him hesitant to point out exactly where the sovereignty of the community rests. He does not use the word 'sovereign' either for the monarch, the legislature or the people. The reason is that his attention is concentrated on the rights of the individuals. This created a ten-

dency in him to set limits on the rights of the sovereign. H suggests the majesty of natural law to perform this functio The ultimate control, therefore, is given by Locke neither t legislature nor to the community behind it, but to a system natural law upholding Natural Rights. The law of nature nothing but the law of God. He says.

> "Who shall be judge whether the prince or legislative act is contrary to their trust? To this I reply, the people shall be judge, for who shall be judge whether his trustee or deputy acts well and according to the trust reposed in him, but he who deputes him, must, by having deputed him, have still a power to discard him when he fails in trust? But further who shall be judge? cannot mean that there is no judge at all. For where there is no judicature on earth to decide controversies amongst men, God in Heaven is Judge."[1]

Professor Laski's observations, "Nor is Locke's state sovereign state ; the very word 'sovereignty' does not occu significantly enough, throughout the treatise"[2] is factually in correct. Locke has very significantly used the word sovereig for the Sovereignty of God. He says,

> "For men being all the workmanship of one Omnipotent and infinitely Wise Maker; as all the servants of one Sovereign, Master, sent into the world by His order and about His business; they are His property, Whose workmanship they are made to last during His, not one another's pleasure."[3]

Whenever he talks of the law of nature or the law of God he does so in the sense of sovereignty of law being the Wil of God, His Sovereignty of Law is just like the sovereignty o the *Shari'ah* in Islam. He says,

> "The law of nature stands as an eternal rule to all

1. Locke, *On Civil Government*, Art. 240-242.
2. Laski : *From Locke to Bentham*, p. 36.
3. Locke: *On Civil Government*, p. 119-120.

> men, legislatures as well as others. The rules that they make for other men's actions must as well as their own and other men's actions be conformable to the law of nature, that is to the Will of God, of which that is a declaration and the fundamental law nature being the preservation of mankind, no human sanction can be good or valid against it."[1]

The problem with Locke is that he is unable to point out the Will of God or the law of nature in the form of an established, settled, known and comprehensive body of law receieved and allowed by common consent to the standard of right and wrong and the common measure to decide all controversies between them. He is standing on the boundary line of Islam watching its system with a very keen eye.

The Influence of Islam on Locke

In his Introduction to Locke's *Civil Government*, W. S. Carpentar writes,

> "At Oxford Locke was not a very hard student, but he found pleasure in the lectures of Edward Pococke, the Arabic Scholar."

William Bedwell (1561—1632) had already popularised Arabic Studies in England. Edward Pococke (1604—1691) came to be the first professor of Arabic Studies in Oxford, in whose lectures Locke was very keenly interested. What, after all, have been the topics of Pococke's lectures as a scholar of Arabic Studies which created interest in the mind of a great political philosopher in the making. He must have been lecturing on the foundation of the Islamic State on the method of contract (*Baya'ā*) and common consent (*Shūrā*); status of the government as a trust ; the government not merely representative but responsible also; the sovereignity of the *Shari'ah* or the Will of God; and if the ruler violates the Will of God, he to be removed by the people.

1. Gough: *John Locke's Political Philosophy*, p. 145.

It is peculiar with the Western writers that whenever they close their eyes from the hard facts of History and try to resort to far fetched Archaeological excavation, their argument melts into the nabulae of confusion. They are baffled on the source of the concept of trust in the writings of Locke as they are on the sources of Islamic Law. Barker in *Social Contract* has tried to find out the sources of Locke's concept of government as trust in the legal concept of trust in the Roman and English Law. Gough in *John Locke's Political Philosophy* has rejected this argument saying,

> "The political trust is not in all fours with legal trust proper"[1]

Gough on the other hand has connected it with the English constitutional history. But he has failed to point out any precedent of government as trust from theory or practice of the English constitutional history, He has himself admitted that Locke might have had a doubt in his mind whether the political trust had ever been expressly established any time in the history of a state. He, thus, admits that the concept of government as trust had nothing to do with the English constitutional history, either. On the other hand, Dicey has remarked that the British Parliament is not a trustee.[2]

3. *Rousseau's Theory of Sovereignty*

Locke was not, strictly speaking a democrat ; he was an aristocrat. It is correct to say that if Hobbes stood for the sovereignty of one man, Locke stood for the supremacy of a few. He did not stand for the direct and active participation of the people as Rousseau did. Rousseau, therefore, stood for the sovereignty of the people in the real sense.

Rousseau says that man in the state of nature wandered up

1. Locke: *On Civil Government*, Art. 135.
2. Dicey: *Constitutional Law*, p, 201.

and down the forests. He did not need his fellow creatures nor had any desire to hurt them being self-sufficient and subject to so few passions he disregarded everythihg not immediately concerned to notice. He was his own master and it is only education and habits developed in society that makes him dependent upon others and he becomes a slave and inequality makes its appearance.

This problem of a developed society can be solved by either of the two ways: by going back to the woods or by living a life of morality based on social contract. The social contract comprises of the following clauses :—

(*i*) Total alienation of each associate, together with all his rights, to the whole community; for in the first place, as each gives himself absolutely, the conditions are the same for all ; and this being so, no one has any interest in making them burden for others.

(*ii*) The alienation being without reserve, the union is as it can be, no associate has anything more to demand; for if the individual retained certain rights, as there be no common superior to decide between them and the public, each being on one point his own judge, would ask to be so on all; the state of nature would thus continue, and the association would necessarily become inoperative and tyrannical.

(*iii*) Each man in giving himself to all, gives himself to nobody ; and as there is no associate over whom he does not acquire the same right as he yields to others over himself, he gains an equivalent for everything he loses, and an increase of force for the preservation of what he has.

Putting it into simple terms, each individual puts his person ınd all his power in common under the directions of the general vill and in their corporate capacity they receive each member s an indivisible part of the whole. At once, in place of an

individual personality of each contracting party, this act of association creates a moral and collective body composed of as many members as the assembly contains votes, and receiving from this act its unity, its life and its will. This public person so formed formerly took the name of the city and now takes that of republic or body politic; it is called by its members state when passive, sovereign when active, and power when compared with others like itself. Those who are associated in it take collectively the name of people and severally are called citizens, as sharing in the sovereign power, as subjects as being under the laws of the state. In the exact words of Rousseau,

> "The body politic, therefore, is also a moral being possessed of a will; and this general will which tends always, to the preservation and welfare of the whole and of every part, and is the source of the laws, constiutes for all the members of the state, in their relation to one another and to it, rule of what is just and unjust . . . . Each of us puts his person and all his power in common under the supreme direction of the general will, and in our corporate capacity we receive each member as an indivisible part of the whole. This gives a mutual understanding between the public and the individuals and that each individual is making a contract as we may say, with himself, is bound in a double capacity, as a member of the sovereign he is bound to the individuals and as a member of the state, to the sovereign."[1]

Rousseau unites the absolute sovereignty of Hobbes and the popular consent of Locke into the philosophical doctrine of popular sovereignty. He has accomplished for the people, what Hobbes had done for the ruler. After establishing the state with the sovereign power of the general will of the people, he enumerates the attributes of sovereignty in his democratic State. Sovereignty according to him, is inalienable, indivisible, infallible, unlimited, universal and absolute. While discussing the

1. *Social Contract*: pp. 77, 78.

attributes of inalienability of sovereignty he criticises the representative government,

> "Sovereignty for the same reason as it makes itself inalienable cannot be represented; it lies essentially in the general will, and will does not admit of representation. The deputies of the people cannot be its representatives. Every law the people has not ratified in person is null and void. Law is purely the declaration of the general will. The people of England regard itself as free; but is grossly mistaken, it is free only during the election of the members of Parliament. As soon as they are elected, slavery overtakes it".[1]

Influence of Islam on Rousseau

A perusal of all the works of Rousseau like *Social Contract, Emile, Dedication to the Republic of Geneva, A Discourse on Political Economy, The Confessions* etc. shows, beyond doubt, that he has evolved all his ideas under the influence of Islam. His concepts of Institution of state activity, formation of trust for the sake of the running of government and sanctity of the general will of the people is merely the reproduction of the political tenets of Islam. In Islam, the individuals come and go but the institution of State remains. The individuals have their status and role as the members of the corporate body to which the individuals surrender their rights to property and life. The Qur'ān says:

إِنَّ اللَّهَ اشْتَرَىٰ مِنَ الْمُؤْمِنِينَ أَنفُسَهُمْ وَأَمْوَالَهُم بِأَنَّ لَهُمُ الْجَنَّةَ ۔ (التوبہ: ۱۱۱)

> "Allah has purchased of the believers, their persons and their goods; for theirs in return is the paradise." (Q. 9: 111).

This does not mean that the government have the arbitrary and absolute power to rule. The government can act just as a trustee whose powers have been defined by the

1. *Social Contract*: p. 83.

Shari'ah. The sanction behind the smooth running of the trust of government, is the General Will of the People (اجماع الامت). Roussean's General Will of the People and the Islamic concept of Consensus of the people are one and the same thing. The following observations of Rousseau indicate clearly the influence of Islam on his ideas:

> "Mahomet held very sane views, and linked his political System well together; and as long as the form of his Government continued under the Caliphs who succeeded him that government was indeed one, and so far good."[1]

While establishing the government on the democratic pattern, Rousseau faced difficulty. The Masses can feel that their affairs are being looked after according to the law and that no one is above the law, but they cannot give the law. They can act like a mechanic to run the machine but they cannot invent a machine like an engineer. In his own words in *The Social Contract*:

> "How can a blind multitude which often does not know what it wills, because it rarely knows what is good for it, carry out for itself so great and difficult an enterprise as a system of legislation? The individuals see the good they reject, the public wills the good it does not see. The former must be compelled to bring their wills into conformity with their reason; the latter must be taught to know what it wills. This makes a legislator necessary."

In order to discover the rules of society best suited to nations, a superior intelligence, beholding all the passions for men independently would be needed. This is what has in all ages compelled the fathers of nations to have recourse to Divine Interventions. Here Rousseau submits to the Divine Revelations. He says:

1. Rousseau: *Social Contract*, p. 115.

> "The sublime reason far above the range of the common herd, is that those whose decisions the Legislature puts into the mouths of the immortals, in order to constrain by divine authority those whom human prudence could not move."

While emphasising the role of an extraordinary legislator he is all along asserting the necessity of prophethood. Having been convinced of the indispensable role of the prophets of God in giving laws to the human society, he throws a glance of the past history to illustrate his point. He rejects Christianity to quote as an example in this respect. He is deadly opposed to Christianity for the reason, among others, that it separates the moral code from the political institutions. The Judaic law also does not satisfy him because it is not comprehensive. When he comes to Islam, its comprehensiveness and its glorious history absorbs him. He is convinced of the truth of the prophethood of Muhammad (peace be upon him) as that of Moses. He declares,

> "But it is not within the competence of everyone to make God speak, nor to get himself believed when he claims to be His interpreter. The real miracle and the one sufficient proof of the Legislator's mission is his own greatness of soul. Anyone can incise words on stone, bribe oracle, claim some secret understanding with a high divinity, train a bird to whisper in his ear, or invent other ways, no less crude, for imposing on the people. He whose powers go no farther than that, may, if he be fortunate, hold the attention of a superstitious mob; but he will never found an empire, and his extravagant production will, in no long time, perish with him. Authority which has no true basis forms but a fragile bond. Only in wisdom can it find hope of permanence. The jewish law still lives, and the law of the *Child of Ismail* which, for ten centuries, has regulated the conduct of half the world. They bear witness even today to the great men who gave them form. To the eyes of pride bred of philosophy or the blind spirit of Party, they may seem no more than fortunate impostors, but true political wisdom will

> ever admire in their institutions the great and powerful genius which watches over the birth of civilizations destined to endure."[1]

Towards the close of his life, Rousseau was being considered by his society as a muslim. This was because he had strongly criticised Christianity and had favoured the system of Muhammad (peace be upon him). Following the argument of the Prophet of Islam he had laid down the principles of his Civil Religion as a cementing and indispensable factor in the unity of the State. His contemporary people used to pay him compliment in the traditional way of Islam by pronouncing the word *Salam-'alaik.* In his *Confessions,* he tells.

> "It was widely believed that he had denounced Roman Catholicism and, especially, Vernes had claimed to prove that he was not a Christian. At Montmorency and at Motiers he had produced an American wardrobe and his wearing it had raised a great strom against him and his lord Marshal on seeing him in this dress, had said, by way of compliment *Salaam-alaik*, and he never afterwards wore another dress."[2]

The Western political philosophers face a dilemma when from the philosophical discussion of sovereignty they enter into the juristic discussion. Here, they have to determine the sovereign which they fails to do, and then, in the state of helpleseness they seek the refuge of Islamic System. In the juristic sense, Austin defines the soverign as 'a determinate human superior not in the habit of obedience to a like superior, receiving habitual obedience from the bulk of a given society.' The search for a determinate sovereign in the Britian leads us to the discussion whether sovereignty lies in the king, the parliament or the electorate. And the search for a determinate sovereign in the U.S.A. involves a critical discussion of the fact whether sovereignty lies in the president, the congress or the Supreme Court and if neither of these, whether it lies in the

1. *Social Contract*, p. 208-209,
2. *Confessions of Rousseau*, v. 2, p. 455.

constitution amending body or in the constitution itself. The discussion of these questions leads to confusion only, which can best be solved by attributing sovereignty to God Almighty or to the expression of His Will—the *Shari'ah*, or to the Holy Prophet (peace be upon him) being the determinate human represntative of the Sovereign God.

III—DEMOCRACY AND ISLAMIC SYSTEM OF SHŪRĀ

1. Terminology

Terminology is always relative to the culture in which it is evolved. Its import is followed by alien ideas and values as well. A self-sufficient system must, therefore, check the diffusion of terms from other systems. Islam being a comprehensive ideology and permanent moral system should throw light on this aspect of the matter. So, the Qur'ān has prohibited the Muslims from the use of such words which are employed by the other peoples as terms. It says:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَقُولُوا رَاعِنَا وَقُولُوا انْظُرْنَا وَاسْمَعُوا ۔ (البقرہ: ۱۰۴)

"O ye men of faith, say not to the apostle words of ambiguous import, but words of clear meaning, and hearken to him." (Q. 2: 104).

The literal translation of *Rā'inā* and *'Unzurnā* is the same that is, please look at us or attend to us. The former word was adopted by the disbelievers by a little twist of pronunciation as a term to suggest some insulting meaning. God ordained to substitute the latter word in place of the former one. The injnuction, not only, prohibits the Muslims from the acceptance of alien terms but alsc orders to drop the use of such words which happen to be part of the foreign terminology.

Democracy is the Western political concept with its own background of ideas. The Muslims should not use it for their political system. A detailed analysis of the Islamic institution

of *Shūrā* may, however, exhibit some similarities with the Western democracy.

2. Basic Idea

The Qur'ān and the *Sunnah* are the repository of the Islamic Law. The Muslims have to implement that in their affairs. This is the collective job of the whole community. No single individual or a class of individuals can claim any privilege in this respect. The holy Prophet (peace be upon him) was required by God to consult the people in their administrative affairs.

وَشَاوِرْهُمْ فِي الْأَمْرِ فَإِذَا عَزَمْتَ فَتَوَكَّلْ عَلَى اللهِ ۔ (آل عمران : ۱۵۹)

"and cosult them in affairs. Then, when you have taken a decision, put your trust in Allah." (Q. 3:159).

It is narrated from 'Alī that the word, *Azamta* (عزمت) means the decisions based on consulation with the people.[1] The Muslims have been ordered by God to proceed in their affairs by consultation.

وَأَمْرُهُمْ شُورَىٰ بَيْنَهُمْ ۔ (شوری : ۳۸)

"They conduct their affairs by mutual consultation.' (Q. 42:38).

3. Structure of Shūrā

1. *Shūrā* means the consultative assembly. The word *bainahum* (بینھم) in the above mentioned Qur'ānic verse lays emphasis that the *Shūrā* must be the representative body of the Muslim community. Running of the government by a representative *Shūrā* is the Method, while election of the represesentative members of the *Shūrā* is the Technique. Islam gives

1. Ibn Kathīr: *Commentary on the Qur'ān.*

iods and leaves the techniques at the disposal of the Muslims. y have to work out by mutual consultation, the way, and ns of election of the representative members according to circumstances. The technique of electing the representa- persons adopted by the Companions of the Prophet (peace pon him) were peculiar to their circumstances. Islam arose n ideological movement. It is an inherent feature of all ogical movements that the persons accepting a movement and contributing most emerge as the leaders of that move- t. Those who rendered outstanding services by virtue of sacrifices insight and wisdom to the body politic of Islam, me prominent automatically. This election took place by means of votes but by virtue of parctical tests and per- ance which is a more natural and reliable technique. The bers of this spontaneously evolved consultative assembly ed the confidence of the Muslim masses to the same extent ich they enjoyed the confidence of the Prophet (peace be him). They were outstanding in military and missionary , and were well versed in jurisprudence and literature. At me of the death of the Prophet (peace be upon him) there thus, no need for taking votes for them. Even if votes taken, there was nobody else in the whole Muslim world would have been perfered over them by the voters. All *hlal hall wal 'Aqd* (those Who tie and untie) from all over Muslim world—Bilāl from Habashā and Salmān from Fāris l happened to have assembled in Madina. It were these e without whose advice no decision was ever taken in any tant matter.

. Abū Hurairah narrates the practice of the Prophet e be upon him) about consultation. He says,

ما رايت احداً آكثر مشوره لا صحابه من النبى صلى الله عليه و سلم -

(فتح البارى ج ١٣ ، ص ٢٨٦)

"I have not seen anybody who could excel the Prophet (peace be upon him) in consultation from his Companions.

'Ā'ishah also says,

"I have not seen a person consulting the people more than the Prophet (peace be upon him). He said that if Abū Bakr and 'Umar got together on an opinion, he would not go against that."[1]

Precedents

(*i*) The Prophet (peace be upon him,) convened the *Sh* to consider whether they should meet the enemy *Badr*. The Companions unanimously gave their verd in favour of the battle.[2]

(*ii*) At the occasion of the battle of *Uḥud*, the Prophet (pe be upon him) was of the opinion that they should fi the enemy by remaining inside the city of Madina. the majority wanted the battle field outside the c The opinion of the majority was honoured.[3]

(*iii*) The fates of the captives in the battle of *Badr* a *Hawāzin* were decided according to the opinion of majority.[4]

(*iv*) Mu'ādh bin Jabal was appointed as governer Yamen by the decision of *Shūrā*.[5]

(*v*) In the case of conflict between Divine Revelation a opinion of the majority, the Prophet (peace be u him) exercised his veto.[6]

3. 'Alī once asked the Prophet (peace be upon h about the manner of settling the administrative affairs after death. He replied.

1. Qāḍhī Thana'ullah: *Commentary on the Qur'ān*, v. 2, p. 191.
2. Ibn Hashām : *Sīrah*, v. 1, p. 64.
3. Tabarī v. 3, p. 11.
4. Ibn Kathīr, v 4, p. 354.
5. Haitamī : *Majma-'al-Zawāid*, v. 9, p 46.
6. Ibn Hishām: *Sīrah*, v. 2, p. 230

قلت يا رسول الله صلى الله عليه وسلم الامر ينزل بنا بعدك لم ينزل فيه قرآن و لم يسمع فيه منك شئى قال اجمعوا العابدين من امتى و اجعلوه بينكم شورى و لا تقضوا بر ائى واحد

(روح المعانى - شورى)

"I asked the Prophet (peace be upon him) how to settle the affairs left without guidance from the Qur'ān and the *Sunnah*. He replied that we should convene meeting of the *Shūrā* comprising of the pious persons of the *Ummā* and decide it thereby. He prohibited from following the opinion of single person."[1]

mar said,

من دعا الى امارة نفسه او غيره من غير مشورة من المسلمين فلا يحل لكم ان لا تقتلوه -

"You have no alternative but to award death sentence to a person who enforces his own or someone elses' government without consultation.[2]

:cedents

(*i*) *Shūrā* comprises of two houses: *Majlis i 'Aam* and *Majlis i Khās*. The former consists of the general representatives and the latter comprises of the persons learned in the affairs (*Ahlal-Hall wal 'Aqd*).[3]

(*ii*) Abū Bakr was elected as caliph by the *Shūrā* in the meeting of *Majlis i 'Aam* held at Saqīfā Banī Sā'idā—a shadowy surrounding specified for the general gatherings.[4] His name was proposed by 'Umar and others accepted it.

1. Rūhul-Ma'ānī, v. 25, p. 42.
2. Mu'īn-ud-Dīn : *Khulafāe Rāshideen*, p. 53.
3. *Kanzal 'Ummāl* v. 5 p. 38.
4. Bustanī: *Dāirata-lMa'ārif*, v. 9, p. 44.

(*iii*) Abū Bakr convened the meetings of *Majlis i 'Aam* discuss the sending of the troops under the banner Usāmā and taking of action against the apostates wl refused to pay *Zakāt* to the state. A hot debate toc place and all were convinced by the arguments af Ab Bakr. No action was taken by Abū Bakr until tl *Shūrā* gave its consent.[1]

(*iv*) Abū Bakr, towards the end of his life, convened tl meeting of *Majlis i Khās*. He proposed the name 'Umar as his successor. All agreed and the matt was placed before *Majlis i'Aam* where he addressed. "Are you agreeable on the person I am suggesting my successor. I have given anxious consideratic to the matter, and I have not proposed any of m relatives. He is 'Umar bin Khattāb. Will you obe him? The people shouted with one voice, "We sha obey him."[2]

(*v*) The people of *Baital-Maqdis* demanded that 'Um should himself go there and settle the terms of tl treaty. The *Shūrā* was convened who decided th he might go.[3]

(*vi*) 'Umar wanted to command the battle of Fāris pe sonally. But the *Shūrā* decided that he should sta back and he did not go.

(*vii*) The issue whether the land of 'Irāq should be distr buted among the armed forces or its revenue shoul be deposited in the state treasury, was put by 'Um before the *Shūrā*. It was decided by the majority th it should be deposited in the state treasury.[4]

(*viii*) At his death bed 'Umar appointed a committee of s

1. Ibn Kathīr, v. 4., p. 212.
2. Ṭabarī : v. 2, p. 618.
3. Ibn Kathīr, v. 7. p. 35.
4. *Ibid.*, p. 107.

persons to propose one out of them as his successor. The committee proppsed the name of 'Uthmān. This proposal was put before the *Majlis i 'Aam* which accepted it. Thereafter, the general *Bay'ā* (بیعت) was held.[1]

(*ix*) 'Uthmān was assassinated by a few agitators who did not represent any part of the Muslim community. Some of the Companions assembled in the house of 'Alī and said that nobody was more suitable than him to be the caliph and he should, therefore, shoulder the responsibility. He declined to do so. When they insisted, he agreed saying,

"If you wish it to be so, then come to the mosque, for my acceptance as caliph cannot be secret nor without approval of the general people of Madina—*Majlis i 'Aam.*"[2]

[e once wrote to his political rival Mu āwiyah:

انما الشورى للمهاجرين والانصار فان اجتمعوا على رجل و سموه اماماً فكان ذالک لله رضاً ۔

"The representative *Shūrā* can be constituted by the prominent Companions only. The true and lawful head of the Muslim state can be that person who is elected by them.[3]

Qualifications of Caliph

(*a*) he must be a Muslim,

(*b*) he must be a jurist (مجتہد). Imam Shāṭibī in *Al-I'tiṣām* has stated consensus (اجماع) on this qualification of head of a Muslim state.

The basis of the first qualification is incorporated in the Qur'ānic verse (اولی الامر منکم) meaning thereby that the rulers

1. Hāmidal-Anṣārī : *Islam ka Nizāme Hukūmat*, p. 309.
2. Tabarī, v. 3, p. 450.
3. *Nahjal-Balāghā*, p. 62.

must be from amongst the Muslims. The reason of the secon qualification is manifest. The person who does not have dee understanding of the *Shari'ah*, cannot conduct the affairs of th Muslims according to that.

The phrase *'ulil amri minkum* (اولی الامر منکم) stipulates both the qualifications. The verse is addressed to the muslims Therefore, *minkum* (from among you) means that the rulers shoul be muslim. The letters *Alif lām* (ال) prefixed with the wor *amr* (امر) indicate that *amr* or authority is proper and not com mon, and is essentially related to the authority of God (Qur'ān and the Prophet (*Sunnah*), which has already been described in the verse. Therefore, the persons who hold this authority must have sufficient knowledge of the Qur'ān and the *Sunnah*.

5. Impeachment of Caliph

The head of a Muslim state has no right of veto.[1] He i bound by the majority decision of the *Shūrā*. *Shūrā* on the other hand can impeach the caliph.

The jurists like Māwardī and Abū Ya'lā have clearly written in *Ahkam-al-Sulṭāniyā* that a caliph can be impeached by a Muslim Community. 'Azudud-Din says in *Al-Mawāqif* and Syed Sharīf supports him in his commentary thereon, that the *Ummā* has a legal right to impeach the Imam if he is not performing his functions properly. They emphasize that appointment as well as impeachment of head of the state is the collective right of the Muslim community.[2] Shaukānī, in his commentry on the Qur'ān writes,

و حکی القرطبی عن ابن عطیه لا خلاف فی وجوب العزل من لا یستشیر اهل العلم والدین

"Qurtubī has quoted Ibn 'Aṭiyā that there is no difference among the jurists that it is obligatory to impeach a head of the state who runs the government

1. Abul 'A'alā Maudūdī : *Islamī Riyāsat*, p. 543.
2. *Al-Mawāqif* with Commentry, v. 8, p. 353.

without consulting the learned and the representative persons."[1]

Ibn 'Ābidīn Shāmī has pointed out the basic wisdom underlying this right of impeachment. He says that the appointment of head of the state is the collective obligation (واجب كفايه) of the *Umma* to implement the exclusive Sovereignty of God Almighty. If this objective is not being achieved effectively through a particular head of the state, it is obligatory (واجب) to replace him by a suitable person.[2]

Dr. 'Abdul-Karīm 'Uthmān has collected all the traditions of the Prophet (peace be upon him) relating to obedience (اطاعت) of and revolt (خروج) against the head of state (امير), at one place. After a brilliant analysis he concludes :

ولكننا نجد بين ايدينا الان عدداً من الاحاديث الصحيحة التى تأمر بالصبر و تنهى عن الخروج و اخرى تامر بمنا بذة الحاكم و الحض عليه ـ افلا يعد هذا تناقضاً و كيف نخرج مما يظن من التعارض ـ لقد كشف ابن حزم ان فى هذه الاحاديث نا سخا و منسوخاً فما لا جاديث التى تامر بدفع الظلم و الخروج على الحاكم الظالم متأخرة عن الا حاديث الاولى و ناسخة لها و هكذا فليس هناك اى تعارض او تناقض ـ

(النظام السياسى فى الاسلام ص ١٣٦)

"We have got before us the authentic traditions; some of which require patience and prohibit revolt against the deviating heads, while the others order to dispute and disobey them. Is this a contradiction in terms? Ibn Ḥazm has resolved this confusion. He says that the traditions which call for disobedience and change of the deviating heads are later in time and repeal

1. Shaukānī: *Fathal-Qadīr*, v. 1, p. 360.
2. *Raddul-Muḥtār*, v. 1, p. 511.

those belonging to the other category. Therefore, there in no contradiction at all."[1]

A head of the state can be impeached on any of the following grounds :

(*a*) If he is not fulfilling the collective obligation of the Muslim community. That is to say that if he is not struggling effectively to implement, throughout the world, what is lawful and prohibit what is unlawful (امر بالمعروف و نہی عن المنکر). This amounts to the establishment of the exclusive Sovereignty of God in the world.

(*b*) If he disbelieves any of the fundamentals of Religion (ضروریات دین), this means that he has by his own act refuted his claim that he is a muslim ; and, thus rebutted the implied presumption from his reciting of the *Kalimā* that he is a muslim.

(*c*) If he flagrantly violates the provisions of the *Shari'ah* The open violation of the *Shari'ah* is sometimes termed as *Ma'siyat-al-Bawwah* (معصیت بواح) and sometimes as *Kufr* (کفر) also.[2] By this, he loses his qualification of *'Adalah* (عدالت).

(*d*) If he is physically disabled.[3]

6. Legal status of usurper (متغلب) Government

Important question of Law is involved regarding the validity of the acts done by a government which comes into power or cotinues to be in power in unlawful manner. Khawārij and Mu'tazilā do not distinguish between *de facto* and *de jure* govornment. They hold the view that in the absence of *de jure* government all the acts done and orders made in a Muslim community are without lawful effect. *Hajj, Jum'a*

1. Dr. 'Abdul-Karīm Uthmān : *Al-Nizā nal-Siyāsī fil Islām, p.* 147.
2. Qāri Mohmmad Ṭayyab : *Shaheed e Karbalā*, p. 21.
3. Māwardī : *Ahkāmal Sulṭāniyā*, p. 41.

prayers, functioning of the courts, and political and social transactions of the muslims are void. The working of the whole muslim society is legally suspended.

On the other hand, Murji'ā maintain that the manner of coming into power is irrelevent. If the government has *de facto* political control, all the acts done under it are legally valid. This view tried to paralyse the political movements among the muslims, which tried to overthrow the unlawful government. Abū Ḥanifā, however, adopted the correct and sound legal position. He distinguishes between the *de facto* and the *de jure* government. He says that if a person happens to be in power in an unlawful manner, his rule is void *ab initio*. His orders are not binding on the Muslims ; rather, they are under obligation to overthrow him. But the acts done under his government, which would have otherwise been lawful, are valid.

The conduct of Abū Hanifā is the practical demonstration of his view. In 740 A. D., Zaid bin 'Alī declared revolt (خروج) against the illegal Umayyād dynasty. Abū Hanifā gave him considerable monetary aid. At that time he was not much influential and, secondly, he had reasonable doubts regarding the success of this campaign. For this reason, his support did not exceed the monetary limit. In 763 A.D. Mohammad Nafs-al-Zakiyā and his brother Ibrāhīm came forward to overthrow the unlawfully established 'Abbāside dynasty. This time Abū Hanifā had emerged as a great jurist of the East and this movemont was also being led on sound footing throughout the Islamic world. He, therefore, was all out for that revolution inspite of the continuous curfew in Kūfā. Al-Kardarī and Al-Muwaffaqāl-Makkī say that he gave *Fatwā* that support of that revolution was an act of more piety than war against disbelievers and seventy pilgrimages. It was only under his influence that commander-in-chief of the armed forces Hasan bin Qahṭubā refused to obey the orders of 'Abbaside Caliph Manṣūr.

The distinction between *de jure* and *de facto* governments

and the legal status of a usurper government has been narrated from Abū Hanifā by many Ḥanafi Jurists. Jaṣṣās Rāzī in his juristic commentary on the Qur'ān and Sarakhsī in *Mabsūt* write,

> "Any person who occupies a public office like that of a Caliph, judge etc. in unlawful manner is a usurper. His holding of that office is viod. People are not bound to obey his orders. The Qur'ānic verse that "The deviators will not get My order of appointment (عهدی الظالمین)", ordains that. The holy Prophet (peace be upon him) has warned that obedience is not due to a sinful ruler.—All the jurists of 'Irāq are of the view that the lawful orders of a usurper ruler and judge are legally effective but this does not mean that his holding of the office is valid."[1]

It is lawful, even, for one solitary individual to declare revolt against a usurper. But, then, he must not surrender even if he is martyred; so that the righteous stand may not be disgraced.

The above discussion provides a sufficient answer to the misunderstanding caused by Prof. Ann K. S. Lambton of London University in the 'International Islamic Colloquium' held at Lahore in 1937. She said that Islam does not provide any solution for the problem of unrighteous rule. According to her the problem of unrighteous ruler was never really faced by the main body of Islamic Opinion whether Sunni or Shi'ā. Once the political institution of Islam is corrupted it cannot be corrected by some collective action.

It seems that Professor Ann is unaware of the sociological causes of proper and improper functioning of the representative political institutions. Nor she knows thoroughly the history of Islamic Jurisprudence. She has picked up scattered views of some Asha'rī jurists to prove her thesis, which is highly an unscientific approach.

1. Jaṣṣāṣ Rāzī: *Ahkāmal Qur'ān*, v. 1, p. 81; *Mabsūṭ* v. 10, p. 130.

A representative political institution functions on healthy lines only if the persons who truely represent the community are organised. In the absence of that, even a written constitution is a scrap of paper and adult suffrage is a fraud. As long as the *Ahlal Hall wal 'Aqd* (the learned persons) remained in an organised form with their stronghold in Madina, the Islamic system of *Shūr i* worked very smoothly. Shift of the seat of government from Madina disorganised the truly representative persons. After that an era of struggle started between the unrighteous rulers and the reformers. The latter struggled hard for the organisation of *Ahlal Hall wal 'Aqd*, while the former concentrated on its sabotage. Almost identical analogy of this situation can be found from the regime of Gen. Yaḥyā Khan in Pakistan. He claimed to remain in power as long as some representative persons did not replace him. But he had a mind to extend the interim period indefinitely by managing intrigues in the political spheres. Exactly, the same position was adopted by the unrighteous and dynastic rulers of the Islamic history. They had no other way to stand before the pressure of the collective conscience of the Muslim community and the popular political movements. Al-Mā'mūn was once asked by a commoner, undauntedly

> "Tell me regarding this seat which you occupy—do you sit there with the unanimous consent of the people or by violence or force?"

Mā'mūn replied

> "Neither the one nor the other; but one who governed the affairs of the Muslims bequeathed it to me and to my brother, and when the authority devolved upon me I felt that I needed unanimous consent of the people but I saw that if I abandoned the Government the security of Islam would be disturbed, the highways would be infested with robbers and the public affairs would fall in to confusion, and there

> would be strife and disorder by which the Muslims would be hindered from going on pilgrimage and doing their duty, wherefore I arose in defence of the people unless they should be of accord on a person whom they should approve, and I would then resign the government to him; now whenever they agree upon a 'man' I will abdicate in his favour."[1]

The occupation of the seat of Caliph by an unrighteous rule does not mean the absence of true constitutional spirit from the Muslim community. The pretension as interim arrangment, rather, signifies the predominance of that. In the statement that "the problem of unrighteous ruler was never really faced by the main body of Islamic Opinion", the reference is primarily towards the Muslim society as a whole. This statement is utterly wrong and against the facts of the History.

This problem was successfully faced theoretically as well as practically. The frequence of the absolute success of the organized struggle of the constitutional reformers is not less in number than the unrighteous rule. Take the instance of the Sultanate of Delhi in India alone. It was due to the efforts of Khawaja Nizām-ud-Dīn Auliyā that only that person could remain in power who was truly representative and really pious. The Moghul emperor Akbar abandoned the path and decided to compromise with the Hindu religon in order to safeguard the perpetuity of his dynasty. Mujaddid 'Alf Thānī led an effective movement against his designs. Not only that the scheme of *Dīn-e-Elāhī* failed but also a member of the same Moghul family AurangZeb 'Ālamgīr emerged as a product of the Mujaddid's movement, who sacrificed the Moghul dynasty for the cause of establishing the rule of *Shari'ah* in India.

1. Amīr Alī; *A short History of Saracens*, p. 281.

7. Contrast with Western Democracy (hereinafter to be called Democracy)

SHŪRĀ	DEMOCRACY
(*i*) Islam is the State Religion and *Shari'ah* is the only source of laws.	The government has no state religion.
(*ii*) *De jure* jurisdiction extends throughout the world, geographical boundaries cause no limitations.	*De jure* jurisdiction is limited to the geographical boundaries of the state.
(*iii*) God is the Sovereign, the Prophet is representative of the Sovereign and the *Shari'ah* is the Will of the Sovereign.	Repositoy of sovereignty is untraceable. The scholars try to attribute it sometimes to the people and sometimes to their representatives, and sometimes to notions of natural law.
(*iv*) Complete rule of law (*Shariah*) is established and rule of man over man is absolutely eradicated.	The opnion leaders make and mould the opinions of the people and it is they who practically rule the majority and get laws enacted wherein their vested interests are reflected. The rule of man over man is very much there.
(*v*) The people are only the vicegerents of God. They have no jurisdiction to override any provision of the *Shari'ah*.	The people can pass any law, whether right or wrong, which may be repealed by their successors.
(*vi*) The Parliament is the trustee of the people.	The British Parliament is sovereign and not trustee of the people.[1]

1. Dicey: *The Law of the Constitution*, p. 201.

IV—FUNDAMENTAL RIGHTS

The Orientalist N. J Coulson, lecturer in Islamic Law, School of Oreintal and African Studies, Uriversity of London, is of the view that the conception of Fundamental Rights is antagonistic to the theory of an Islamic State.[1] This is the result of writing on a subject without having thoroughly read it. There cannot be a higher guarantee for ensuring the Fundamental Rights of man than that the Islamic State itself is subject to the Divine Law. The Divine Law specifically and expressly states all the Rights which are so basic that they are called Fundamental Rights in the Western legal systems.

1. Right of Personal Freedom

A person's liberty and his right of movement cannot be curtailed without establishing his offence in a court of law. No action can be taken against somebody merely on the basis of allegations. His guilt must be ascertained beyond all reasonable doubt. The Qur'ān says:

يَا أَيُّهَا الَّذِينَ آمَنُوا اجْتَنِبُوا كَثِيرًا مِنَ الظَّنِّ ۔ (الحجرات: ۱۲)

"O' ye who believe! Avoid acting on the basis of suspicion as much as possible." (Q. 49: 12).

Umar has said,

لا يوسر رجل فى الاسلام الا بحق

"In Islam no person can be put behind the bars except in accordance with Law."

2. Right of Equality before Law

Every citizen of an Islamic State is equal in the eyes of

1. *International & Comparative Law Quarterly*, January, 1957.

law. The Qurān says:

يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا إِنَّ أَكْرَمَكُمْ عِنْدَ اللَّهِ أَتْقَاكُمْ ۔ (الحجرات: ۱۳)

"O' Mankind! We created you from a single (pair) of a male and a female, and made you into groups and tribes that ye may know each other. Verily the most honoured of you in the sight of Allah is (he who is) the most righteous of you." (Q 49: 13).

The differences of colour, language and tribes are strictly horizontal to facilitate identification. In the eyes of God (law of) these differences are without any significance, and preferential treatment on the basis of ascribed and unearned characteristics is bad and un-Islamic. The Pharoah has been condemned by God for such deeds.

إِنَّ فِرْعَوْنَ عَلَا فِي الْأَرْضِ وَجَعَلَ أَهْلَهَا شِيَعًا يَسْتَضْعِفُ طَائِفَةً مِنْهُمْ (القصص: ۴)

"Truely Pharoah elated himself in the land and broke up its people into sections depressing a group among them." (Q. 28: 3).

3. Right to hold Property

Every citizen of an Islamic State, irrespective even of religion, has right to the basic necessities of life. The Qur'ān used the word *Rizq* (رزق) for the basic necessities and says:

وَاللَّهُ فَضَّلَ بَعْضَكُمْ عَلَىٰ بَعْضٍ فِي الرِّزْقِ فَمَا الَّذِينَ فُضِّلُوا بِرَادِّي رِزْقِهِمْ عَلَىٰ مَا مَلَكَتْ أَيْمَانُهُمْ فَهُمْ فِيهِ سَوَاءٌ ۔ (النحل: ۷۱)

"Allah has bestowed His gift of sustenance more freely on some of you than others. Why, those who are more favoured, do not throw their gifts to those who owe their subsistence to others, so as to be equal in that respect." (Q. 27: 71).

The categorical divisions of the haves and the have-nots cannot exist in Islamic State. The difference of degrees or that of more or less may, however, exist which is natural in a healthy society. The moment some persons are devoid of the means of subsistence, duty devolves on the entire society to make arrangements so that they may stand on their own feet. In the verse:

وَفِيْٓ اَمْوَالِهِمْ حَقٌّ لِّلسَّآئِلِ وَالْمَحْرُوْمِ۔ (الذریت : ۱۹)

"And in their wealth, there is the right of him who asked and him who was (for some reasons) prevented (from wealth)." (Q. 51: 19).

the word *māl* has been used. Its exact translation is 'means of production' or 'earning profit.' The true connotation of the above verse would be that those who are deprived from such means have legal right to be provided with that. The state is under obligation to do so.

A citizen is required by the state to get property only as has been permitted by the Islamic Law. At the same time every citizen's right to lawful enjoyment of his property is protected. Nobody, including the state, can deprive him of that. It has been said in the Qur'ān:

وَلَا تَاْكُلُوْٓا اَمْوَالَكُمْ بَيْنَكُمْ بِالْبَاطِلِ۔ (البقرۃ : ۱۸۸)

"Do not have access to each other's property in unlawful manner." (Q. 2: 188).

The state is as much bound to obey the Divine Law as an ordinary citizen. Even an emergency cannot justify acquisition of property without adequate compensation. Serious exigencies befell on the Islamic State at the occasions of the battles at 'Hunain' and 'Tabūk.' The Prophet (peace be upon him) did not order for any compulsory acquisition. He persuaded the people to give donations and got some loans in addition to that. After all, a real emergency is not merely for the

government. It is for the whole society, and popular government can safely depend on donations and willing loans.

After the victory of Hunain and returning from the seige of Hawāzin, the Prophet (peace be upon him) waited for the people of Hawāzin for a few days and then distributed the spoils of war (غنیمت) between the Muslims. After the distribution, their deputation arrived which is known in the Islamic History by the name of Deputation of Hawāzin. They embraced Islam and demanded that their property and prisoners might be returned. The Prophet (peace be upon him) replied that he waited for them, but then had distributed the property as well as the prisoners among the Muslims. He, however, gave them option to get back either the prisoners or the property. They chose the prisoners. The Prophet (peace be upon him) asked that an election might be held among the Muslims and the representatives should be chosen to inform him of the fact whether the Muslims were willing to return the prisoners with or without compensation. He made it clear that if they decided to get compensation, that would be certainly given to them by the state[1].

In the history of Islam, no emergency can be more serious than that of the 'Hijrā' of the Prophet (peace be upon him) towards Madina. The Prophet (peace be upon him) constituted brotherhood (مواخات) between the *Muhājirīn* (immigrants) and the *Ansār* (the local helpers) in which the latter shared property with the former. After sometime every *Muhājir* returned the property with thanks.[2]

The state cannot take away the property of the citizens by imposing taxes not provided in Islamic Law. Ashraf 'Alī Thānwī in his booklet *Jazl-al-Kalām* has written that the Government which imposes taxes not provided by Islam is unrighteous (فاسق) ruler. Shamsal-Ā'immā Sarakhsī protested against such

1. Ibn Hajar, *Fatah al-Bārī*, v. 8, p. 26.
2. ibid., v. 5, p. 180.

taxes and declared them without jurisdiction in his *fatwā*. As a measure of retaliation he was put to prison where he compiled his famous book *Al-Masbūt*.

The limitations on the state power to impose arbitrary taxes and to acquire property without public necessity, are to avoid dictatorships and usurper governments. The right to hold property cannot, however, be allowed to cause exploitation. The doctrine of *maṣalih-al-Mursalah* empowers the Government to legislate for the purposes of eliminating exploitation (استحصال). Shah Walī-Allah Dehlawī says that consent of the needy labourer does not make the profit lawful. Unless fair wages are ensured for the labourer, the production and profits are illegal and prohibited (حرام)[1]. Ahmad bin Hanbal declared that it is lawful to compel the owner of a commodious house to accommodate therein the person who has no place to reside.[2]

In a muslim society the standard of economic living must not become the status symbol.[3] This idol is broken by making it obligatory on the public servants that their standard of living must not exceed that of the common man. Their residence, conveyance, clothes and food should reflect the minimum standard of living of that society. In other words *Faqr* (فقر) or saintly life is obligatory on the public servants, even if they could afford comforts from their personal sources[4]. This state of affairs, which was strictly managed by the Prophet (peace be upon him) and the Righteous Caliphs, snatches prestige and power from property.[5]

4. Freedom of Expression

According to the Qur'ān one of the major causes of the

1. Shah Walī Allah: *Hujjat Allah al-Bālighā*, v. 1, p. 112.
2. Abū Zahrā: *Ibn Hanbal*, p. 301; Ma'rūf Dawalibī: *Al-Madkh* p. 241.
3. Ibn Taimiyā: *Iqtiḍhā al-Ṣiraṭ al-Mustaqīm*, p. 134.
4. Ibn 'Abdul-Ḥakīm: *Sirah 'Umar bin 'Abdul 'Azīz*, p. 31.
5. Abū Yusuf: *Kitāb al-Kharāj*, p. 26.

lownfall of the Jews was their indifference to the evils:

كَانُوْا لَا يَتَنَاهَوْنَ عَنْ مُّنْكَرٍ فَعَلُوْهُ لَبِئْسَ مَا كَانُوْا يَفْعَلُوْنَ ۔ (المائدة: ٧٩)

"Nor did they forbid one another inequities which they committed: evil indeed were the deeds which they did." (Q. 4: 82)

The expression of truth at the face of a tyrant is the best ɔrm of struggle in the way of God. This maintains the internal ealth of the state which is more important than the territorial ggrandisement. Enjoining for the good and forbidding from he evil is an essential duty of the Muslim Nation.

كُنْتُمْ خَيْرَ اُمَّةٍ اُخْرِجَتْ لِلنَّاسِ تَاْمُرُوْنَ بِالْمَعْرُوْفِ وَتَنْهَوْنَ عَنِ الْمُنْكَرِ ۔
(آل عمران: ١١٠)

"You are the best nation evolved from mankind, you enjoin what is right and forbid what is wrong." (Q. 3: 10)

Performance of such an essential duty is the fundamental ight of every individual. In Islam, the expression is not merely right but it is a moral duty also. The imposition of restric-ons on the freedom of expression not only snatches a funda-ıental right but also creates hindrance in the way of per-ɔrming the duty.

. Right to Form Association

Right to form association is the outcome of the freedom of xpression. In spite of adherence to one ideology, there may xist various schools of thought. Similarly, a group of indivi-uals has right to claim that they have a better programme of nplementing the *Shari'ah* in a specific set of circumstances.

The formation of association for the sake of enjoining the ood and forbidding the bad is, again, more than a right. It is

also a duty:

وَلْتَكُنْ مِّنْكُمْ أُمَّةٌ يَّدْعُوْنَ إِلَى الْخَيْرِ وَيَأْمُرُوْنَ بِالْمَعْرُوْفِ وَيَنْهَوْنَ عَنِ الْمُنْكَرِ۔

(آل عمران : ۱۰۴)

"Let there arise out of you a group of people inviting to all that is good; enjoining what is the right and forbidding what is wrong." (Q 3: 38)

For the first time in Islamic History this question arose in the Caliphate of 'Alī. He recognized the right of the Khawārij to form a political organization. He assured them that they would be free to perform their activities as long as they did not resort to armed revolt.[1]

Every Muslim has got right to take part in politics, for the government is under obligation to run its affairs in consultation with the people:

وَأَمْرُهُمْ شُوْرٰى بَيْنَهُمْ ۔ (شُوْرٰى : ۳۸)

"They run their affairs by consultation among themselves." (Q. 42: 38)

Māwardī in *Ahkam-al-Sulṭaniyā* has written the procedure of impeachment of Caliph adopted by the Muslims. After prayer in the central mosque of the capital, any person might come out, deliver a speech and move impeachment of the Caliph. In those days the Central Mosque of the Capital was in the nature of House of Parliament.

Islam expressly recognizes the right to protest:

لَا يُحِبُّ اللّٰهُ الْجَهْرَ بِالسُّوْٓءِ مِنَ الْقَوْلِ إِلَّا مَنْ ظُلِمَ ۔ (النساء : ۱۴۸)

"Allah loveth not that evil should be noised abroad in public speech, except when injustice has been done." (Q. 4: 148)

This protest can be in an organized form after formulating an association. It should be, however, in a manner which does not endanger the life and property of the lawful citizens.

1. Sarakhsī: *Al-Mabsūṭ*, v. 10, p. 131.

Freedom to Profess Religion

The individuals living in an Islamic State enjoy freedom to ofess any religion or belief. It has been provided in the ır'ān:

لَآ إِكْرَاهَ فِي الدِّيْنِ ۔ (البقرة : ٢٥٦)

"Let there be no compulsion in religion."
(Q. 2: 156)

For the Muslims, service in the armed forces may be made mpulsory anytime. The non-Muslims are given option to ht under the Muslims or to pay poll tax (جزیہ), in the ernative. The state in return guarantees the protection of ir religion, personal law, persons, and properties. Their edom of religion is subject to the condition that they would t profess anything derogatory to Islam. The non-Muslim ojects are more secure in a purely Islamic State than minorities any secular state. The latter believes in geographic nation-od (وطنیت) and can claim to pass any law within its territory. case, the majority is angry with them the minorities are omed. The former is based on ideological nationhood. The vernment cannot override the injunctions of Islam: in case it es, the non-Muslims can have recourse to the courts of law.

Rule of Law

Justice according to law has been ensured by the Qur'ān der all the circumstances. It says,

وَلَا يَجْرِمَنَّكُمْ شَنَاٰنُ قَوْمٍ عَلٰٓى اَلَّا تَعْدِلُوْا اِعْدِلُوْا هُوَ اَقْرَبُ لِلتَّقْوٰى ۔ (المائدة: ٨)

"And let not the hatred of a people incite you to depart from justice. Be just; that is nighest to piety."
(Q. 5: 9)

Even the Prisoners of War and the war criminals have right be treated according to Islamic Law. No government can oject them to its arbitrary decision.

8. Right of Disobedience

Islam believes and ensures complete institutionalization. Nothing but rule of Divine law prevails. A subordinate is bound not to obey the illegal orders. He must, partially, rescind the contract of obedience (*bay'ah*) between the government and the people which is based on the condition that the former will follow only the legal course. The government cannot expect arbitrary subordination, and disobedience under such circumstances does not amount to insubordination. The Qur'ān says,

وَلَا تُطِعْ مِنْهُمْ آثِمًا أَوْ كَفُورًا۔ (الدھر: ۲۴)

"And hearken not to the sinner or the ingrate among them." (Q. 76: 14)

Conclusion and Comparison

In the Western legal systems, Fundamental Rights are limited in number, are basic in nature and, unlike ordinary laws, cannot be changed by ordinary law making bodies. In Islam, their number is not limited to the above-mentioned Rights. Every right enunciated by the Qur'ān and the *Sunnah* is so Fundamental that no authority, what to talk of extra-ordinary law making body, can change it. It is immune from any Emergency or Martial Law.

In the Western legal systems, rights are basic and duties are reciprocal; whereas in Islam duties are basic and rights are axiomatic. A muslim citizen is basically duty conscious and principle loving. A secular state makes its citizens concentrate on rights, and sows the seeds of selfishness, law avoidance, subnationalism and national wars.

In a Muslim state, Fundamental Rights do not owe their existence to a man-made document called 'Constitution'. These emerge from the Divine Law. The Muslims collectively or individually, cannot subtract or add anything to the Divine Provisions. They have no jurisdiction to do so as long as they

profess Islam. The Qur'ān says:

وَمَا كَانَ لِمُؤْمِنٍ وَّلَا مُؤْمِنَةٍ إِذَا قَضَى اللّٰهُ وَرَسُوْلُهٗ أَمْرًا أَنْ يَّكُوْنَ لَهُمُ الْخِيَرَةُ مِنْ أَمْرِهِمْ وَمَنْ يَّعْصِ اللّٰهَ وَرَسُوْلَهٗ فَقَدْ ضَلَّ ضَلٰلًا مُّبِيْنًا۔ (الاحزاب: ٣٦)

"It is not for a believer, man or woman, when a matter has been decided by Allah and his Apostle to have any option about their decision. If anyone disobeys Allah and His Apostle, he is indeed on a clearly wrong path." (Q. 33: 36)

V—SCOPE OF LEGISLATION

The Law has been given to the Muslims finally in its complete and comprehensive form. The Muslim community has been, however, authorized by the Islamic Law to legislate in certain spheres. This power of legislation is controlled by well defined principles and objects.

1. Role of Ijmā'

Complete verbal description of concrete events is not possible. Out of the three forms of the *Sunnah—Qualiya* (by words), *Fi'liya* (by actions) and *Taqrīriyā* (by implied consent), the last one is transmitted to the coming generations by means of the written record as well as the unanimous practice of the Muslim community. The consensus of the community, being an indispensable carrier of the *Sunnah* has been recognized by the Qur'ān and the *Sunnah*, as the third source of Islamic Law.

In addition to this, there is another reason for giving legal status to Ijmā'. The *Shari'ah* is eternal. To maintain this character some legally recognized device was required to meet the administrative problems of changing situations relative to particular time and place. This function also has been delegated by the *Shari'ah* to *Ijma'*. If a particular resolution relating to the spheres specified by *Ijma'* is adopted by the representative body of the muslim community, legal sanctity is attached to it and it is binding on the people.

2. Shift in Scale of Values

The body of Islamic Law is classified according to a scale

of values—obligatory, recommended, permitted, undesirable and prohibited. The obligatory and prohibited nature of injunctions is final under all the circumstances. The position of the three middle values can be shifted. The permitted can be made obligatory or prohibited as the general welfare of the society requires. The people may record the transaction of marriage into writing or not. In the interest of the general welfare of the people, a law may be made in which the registration of marriage is made obligatory. This shift in scale from permitted to obligotory is termed in the Islamic Jurisprudence as obligatory for extraneous reasons (واجب لغیرہ). This is temporary and can be repealed. If the circumstances do not justify such law, it can be challenged in the court.

3. Technicways

The implementation of the *Shari'ah* is the obligation of the muslim community. The measures which relate to the efficiency of the practical means, always depend on the peculiarities of a particular situation. The Muslims are authorised under the law to adopt such measures and devices according to the needs of the time. The famous tradition of pollination (تابیر نخل) is its classic example. Some persons were pollinating the dates when the holy Prophet (peace be upon him) passed by them. At his enquiring about the purpose of the act, they replied that by that device the date trees bore more fruit. He just did not approve of their reasoning about the efficiency of the device and went away. They stopped doing so and when the trees bore less fruit, they went to the Prophet (peace be upon him) and narrated the fate of the crop. He said,

انتم اعلم با مور دنیا کم

"You know better your worldly affairs."

The matters relating to the efficiency measures adopted for doing a certain job have been termed by the Prophet (peace be upon him) as the wordly affairs (امور دنیا). This tradition has been narrated by Muslim, Ibn Mājā etc., through very sound

hains. The nature and scope of the worldly affairs mentioned
ı this tradition has been defined by the jurists who have
/ritten commentaries on it. Shah Abdul-Ghanī writes.

قلت ان كان مراده من الامور الدنيوية ما يتعلق باهل الحرفة كا
لمزارع والتجارة مثلاً فمسلم ـ و ان كان المراد بها ما يتعلق بقوام
الا بد ان و اصلاح مابينه فله صلى الله عليه وسلم فى ذالک شان
خاص يتحير فيه الفهوم كا حكام المواريث و اقامة الحروب و
المعاملات الدنيوية من البيع والشراء فى ذالک الا من مدد سماوى
فتامل (انجاح الحاجة: ١٨٠)

"I say that the correct meaning of the word 'worldly affairs' in this context is the craftsmanship like agriculture, commerce etc. As far as the reform of the persons and inter-personal relations are concerned, the Prophet (peace be upon him) was par excellance. His capabilities in these matters are beyond human imagination. For instance, the principles of inheritance, the rules of war and the laws of the worldly affairs like sale and purchase could not be known except by Divine Revelation."[1]

Justice 'Iyāḍh (قاضى عياض) further points out that the lack of concern with these matters is not a demerit of prophethood. The reason is that these matters are not the subject of prophethood. Had it been the subject of the prophets, they would have excelled anybody else in this field also. He writes,

و ليس فى هذا كله نقيصة ولا محطة و انما هى امور اعتبارية يعرفها
من جربها و جعلها همة و شغل نفسه بها ـ (شفاء: ٣٠٢)

"There is no harm whatsoever in not knowing the things purely based on experience. Only that person would be well versed who has had experience in this regard and all his attention is concentrated on it."[2]

The context of the tradition and the commentaries on it show that there are two categories of the worldly affairs. The

1. Shah 'Abdal-Ghanī : *Anjaḥ al-Ḥājah*, p, 180.
2. Qāḍhī 'Iyāḍh: *Al-Shifā* p 302.

one comprises of the forms of action and the other concerns with the quality or efficiency of the means employed in the performance of a certain action. The former in its best, cannot be known unless told while the latter can be discovered by skill and experience. An example will roughly explain the difference. A cook cannot know the kind of dish to be cooked unless he is expressly instructed by the master. But the quality of that particular dish depends on the skill and experience of the cook.

The forms of action required to be performed under certain circumstances are the subject of religion. The efficiency measures to improve the quality of means applied in the performance of actions is the field of secular knowledge. This field is secular because it is concerned exclusively with means and is not directed towards any end to render it either good or bad. Sciences being all along concerned with means are the secular knowledge. Einstein says,

> "Science does not create end: even less it instils ends in human beings : Science, at most, supplies the means to attain ends.[1]

The relationship of cause and effect between two or more observable, hence verifiable, phenomena is discovered through experimentation. This is, then, applied to the practical human life for improving the quality of the means. The improving techniques discovered by experiment and observation are divisible into two kinds ; material and non-material. Material technique is called machine which means an instrument to change quantity or direction of force. Non-material technique is called device. Polling by secret ballot is a device which measures public opinion more effectively.

A term is required to express the details of skill involved in machines and devices. Courts of law call upon experts to explain such matters to them whenever required. The Western jurists have not coined any one-word for the matters of expert

1. Einstein : *Essays in Humanism*, p. 2.

testimony. Ashraf 'Alī Thānwī has used the word *Tajribāyāt* (تجربیات) for these matters and has well distinguished them from the field of law. He says,

> "The human affairs have two stages. One is that of *Tajribah.* For instance, how to do a certain act so that more profit is earned ; how to till the soil and at what time to sow the seeds so that more crop is reaped. These are *Tajribayāt.* The other is that of *Shar'iyāt* (شرعیات), for instance, which form of commercial transaction amounts to Usury which is prohibited, and which form amounts to Sale which is permitted. The Tradition of Pollination relates to *Tajribayāt.*"[1]

The sociologist Odam has coined the word *technicways* for attitude and skill involved in the material tools of a society. This word can, quite legitimately, cover the non-material devices, as well. For want of better word, *technicways* is adopted by us for the non-religious and non-juristic field of human life.

The tradition of Pollination has authorised the Muslims that they are free for the choice of their *technicways.* With the advancement in civilization and complexity of life, *technicways* may be adopted at the collective level. Ijmā' solves this problem and gives legal character to the *technicways.* This justifies legally the working of planning at the state level in an advanced and super-modern Islamic Society. The laws relating to the procedure of Elections also fall in this category.

4. Power to Make Statutes

Codification means clear definitions of concepts and distinct arrangment of legal provisions. A codified work of law is good for easy reference but it cannot be enforced as a binding statute. Just as translation of the Qur'ān cannot have the status of the Qurān, codified works of law cannot, legally have the status of the *Shari'ah* which is exclusively reserved for the Qur'ān and the *Sunnah.* Mālik was requested by the then Caliphs to get his *Muwaṭṭā* enforced by official ordinance, but he refused to attach

1. Ashraf 'Alī Thānwī : *Da'wāt e 'Abdiyat,* v. 2, p. 280.

finality to his codification and, thus, to close the gate of *ijtihād.*

The statutes which are in the nature of machinery provisions are within the power of a muslim legislature. The constitution of a Muslim state is its best example. The Prophet (peace be upon him) drafted the first written constitution of the world at the occasion of his founding the Muslim State at Madinā. This Constitution is known as the Charter of Madina (میثاق مدینہ).

Constitution comprises of the principles which regulate structure and function of the organs of a state. Who shall exercise the power, the manner in which the power shall be exercised, and limitations on the exercise of power, are the points which a constitution deals with. Sometimes, some of the principles of general import are put into black and white, and are called the written constitution. In fact, no constitution is completely in written or unwritten form. There is difference of degrees only. Some constitutions are more in the written from while others are more in the unwritten form. In the case of the unwritten constitution of the Britian, Magna Carta and Bill of Rights are in the written form. The written constitution of the United States of America does not contain the rules regarding the political parties, the mode of electing the president and bar to his contest for the third time.

A certain manner of running the affairs of a state is agreed upon and is termed as constitution. This is governed by the ideology and fundamental principles professed by the people living in that state, all of which cannot be put into writing. Secondly, the agreed mode is meant to meet the requirements of a particular time and territory. Under changed circumstances, amendments, additions and the subtraction will have to be made. A written constitution, is neither comprehensive nor final.

Distinction must be drawn between constitution and constitutional law. Constitutional law comprises of the ideology, beliefs and basic principles and law which govern the structure and function of the organs of a state. Constitution

drafted to indicate the manner in which a particular society will constitute and run its state organs in the light of its constitutional law. A document comprising of some machinery provisions of the constitutional law, is the written constitution of a state.

Can a written constitution prevail over the constitutional law of a country? In other words can a wtitten constitution claim the power of choosing some and suspending the other principles of constitutional law? This question is of very significant import in an Islamic Society.

A society based on geographical or racial nationalism can do so. Geographical nation-hood can claim freedom from all or some of the ideological bonds. Similarly, a society organized on the basis of racial superiority may pick up the principles of its choice and ignore the others. But such a state of affairs is inconceivable in an Islamic Society. The very word muslim implies the complete submission and surrender before whatever he has been given through the holy Prophet (peace be upon him). A muslim has no jurisdiction to pick and choose. This amounts to heresy and violation of the clear injunctions of the Qur'ān.

وَيَقُولُونَ نُؤْمِنُ بِبَعْضٍ وَّنَكْفُرُ بِبَعْضٍ وَّيُرِيْدُوْنَ اَنْ يَّتَّخِذُوْا بَيْنَ ذٰلِكَ سَبِيْلًا
اُولٰئِكَ هُمُ الْكٰفِرُوْنَ حَقًّا۔ (النساء: ۱۵۰)

"They say that we belive in some and reject others; and wish to take a course midway. They are in truth (equally) disbelievers." (Q. 4: 150)

The written constitution of an Islamic State must be strictly in the nature of machinery provision. Recognition or non-recognition in it of some or all the principles of the constitutional law of Islam is without any legal effect. The consitutional law of Islam is supra-constitutional and derives its force from God and the belief of the people. When it is the will of the people that they shall regulate their lives according

to the principles of Islam, the constituent assembly comprising of the representatives of the people acts as agent and trustee o the people. By suspending the operation of some principles o Islam and by recognizing those of alien ideology, it perform the role of an unauthorised agent. Such a step taken by th constituent assembly is bad in the eyes of law for another reason Resolutions of a muslim assembly being in the nature o Ijmā', cannot supersede the principles laid down by the Qur'ān and the *Sunnah*. Even if, during the election of the constituten assembly, it is announced that the representatives will have th power to pick and chose the supra-constitutional principles, th assembly cannot enjoy such powers. The people can delegat only that authority which they themselves have ; and such a power does not vest in any Muslim.

5. Power to Make Rules

The doctrine of *Masālihal-Mursalā* (مصالح المرسلہ) authorise the Muslims to frame rules for putting into practice the prin ciples of Islam. In some cases discrition has been given by th *Shari'ah* to the government. There are two kinds of punishment fixed (حدود) and discretionary (تعزیر). The latter is left at the dis cretion of the government. The government cannot declare a offence to be a lawful act and *vice versa*. But it can make rule to prescribe the nature and intensity of the punishment for a certain offence of this class.

The Islamic law has originally been laid down in tw forms: concrete practice of the Prophet (peace be upon him and abstract general principles. Abstract general principle can be translated into detailed rules. A principle of the law of evidence has been pronounced by the Qur'ān in the verse,

يَا أَيُّهَا الَّذِينَ آمَنُوا إِنْ جَاءَكُمْ فَاسِقٌ بِنَبَإٍ فَتَبَيَّنُوا ۔ (الحجرات : ٦)

"O Ye who believe, If a wicked person comes to you with any news, ascertain the truth." (Q. 49 : 6).

The rules of cross-examination can be framed to ascertain the truth underlying the testimony of a witness.

6. Talfique : (Change of School)

Talfīque literally means stitching together of various patches. Ibn Taimiyā has reported agreement of the jurists on the point that in case of grave necessity, the opinion of a jurist of some other school may be followed.[1] This is called *Talfique* (تلفيق). Allāmā Shāmī has also permitted to act on the doctrine.[2] Shah 'Abdul 'Azīz Dehlawī has summaried this principle in the following words:

> "A Hanafi can follow the opinion of the Shāfi'i School under three circumstances. Firstly, the argument from The Qur'ān and the *Sunnah* favours in his mind the Shafi'ī view in that respect. Secondly, he faces severe hardship and cannot help following the Shafi'ī, view. The case of a husband whose whereabouts are unknown (مفقود الخبر) is the example of this kind. Thirdly, being a pious man he wants to observe the precautionary measures (احتياط) over and above the required obligations".[3]

Section 2(*i*) of the Dissolution of Muslim Marriages Act of 1939, which empowers a judge to dissolve the marriage if the whereabouts of a husband are not known for four years has been adopted from the Mālikī School. Ḥanafi view requires that the wife should wait till the normal age of the husband, but it causes severe hardship to the wives of such husbands.

VI—THE JUDICIARY

The role of judiciary is to resolve social deadlock peacefully. The privilege of vicegerncy has been bestowed on the Muslim Community (أمة) as a whole. The promise that 'He will make them vicegerents on the earth (يستخلفنهم فى الارض), has

1. *Fatāwā*, v. 2 p. 240.
2. *'Aqūd Rasmal-Muftī*, p. 25.
3. *Fatāwā 'Azīzī*, v. 1, p, 184.

been made with all the righteous believers. Expedience de mands division of labour. The best suited among the Muslim for maintaining the Divine Law, internally and externally, ar entrusted with the job of implementing the *Shari'ah.* Th others adopt education, business, civil and military service etc as occupation, and thus contribute towards the well being o the Islamic State. A contract is formed between the person to be the custodians of the Divine Law and those engaged i other walks of life. The main term of that contract is tha the custodians of law (اولو الامر) or the government will follo the Divine Law and nothing else.

اِتَّبِعُوْا مَا اُنْزِلَ اِلَيْكُمْ مِّنْ رَّبِّكُمْ وَلَا تَتَّبِعُوْا مِنْ دُوْنِهٖ اَوْلِيَاءَ۔ (الاعراف: ۳)

"Follow what has been sent to you by your Lord and do not follow patrons other than Him." (Q. 7: 3)

The other party to the contract—the people—will obey The stipulation in the contract renders obedience to th government, conditional. In case of allegation of breach of th contract, interpreting agency or arbitrator is required to resolv the chaos. Such situations have been envisaged by Qur'ān an the *Sunnah,* and solutions have been suggested by it. The com plete verse runs as follows:

اَطِيْعُوا اللّٰهَ وَاَطِيْعُوا الرَّسُوْلَ وَاُولِى الْاَمْرِ مِنْكُمْ فَاِنْ تَنَازَعْتُمْ فِىْ شَىْءٍ فَرُدُّوْهُ اِلَى اللّٰهِ وَالرَّسُوْلِ۔ (النساء: ۵۹)

"Obey God and (obey) the Prophet and obey the persons from amongst you who hold the authority. In case of dispute between you over any matter, refer that to God and the Prophet." (Q. 4 : 59)

The obedience to God and the Prophet (peace be upo him) is unqualified. It is not so in the case of governmen People owe only that obedience to government which is i furtherance of the injunctions of God and the Prophet (pea be upon him) The word 'obey' (اطیعوا) does not precede 'gover

ment' (اولی الامر) and has been purposely avoided. This signifies that obedience to *ulil amr* (اولی الامر) is qualified and is subject to the obedience of God and the Prophet (peace be upon him). The phrase *ulil amr* literally means the persons who hold the authority. Persons in plural indicate that the individuals who exercise the authority have to do that collectively by consultation. Single-handed dictatorship is ruled out. Then, the letters *alif lam* (ا ل) qualify the word *amr* (امر), according to the Arabic grammer. This is, again, very significant. This means that the authority being stipulated by the verse is not general or any authority. It is that particular authority which has already been mentioned in the preceding part of the verse —authority of God and the Prophet (peace be upon him). To sum up the discussion, *ulil amr* means the persons who exercise authority in the light of the Qur'ān and the *Sunnah*. Obedience to arbitrary authority has not been ordained by the verse. In the next portion of the verse, the scope of dispute between the two parties—the people and the government—has been recognized (in case there is dispute between you), and its solution has been provided. The dispute has to be referred to God, and the Prophet (peace be upon him) which means the bearers of the Divine law or the jurists.

The Qur'ānic teachings in this respect can be summarised in the following points:

(*i*) The relationship between the people and the government is based on contract. Iqbal says,

> "Now we have to see the nature of relationship between the elected (government) and the electors (people). Imām Māwardī has used the word *'Aqd* (contract) for this relationship. In other words the government is the institution whose object is to perform a part of the contract. It is the trustee of the rights and obligations. When Māwardī uses the word *'Aqd* for this relationship, he does not mean like Rousseau that the origin of society is based on social contract. His intention by introducing this word is

to assert that the election among the Muslims is in the nature of contract between the Caliph and the people".[1]

(*ii*) Dispute may arise after the formation of the contrac between the people and the government. Both th parties have right to be vigilant and watch that eac side is performing its part lawfully.

(*iii*) In the case of dispute or breach of the contract b either side, nobody is supposed to take the law in h hands. The matter will be referred to independer and impartial arbitrators—jurists.

(*iv*) The people and the government may agree on manner of establishing a permanent institution jurists to do the job of settling the disputes. The qual fications of the jurists, their remuneration, the moc of appointment, retirement age, etc, may be recorde in a document which is now-a-days termed constitution.

(*v*) The jurists thus appointed are the judges who a completely independent and not loyal to anyboc except God and the holy Prophet (peace be upon him

(*vi*) The judiciary of an Islamic State symbolizes God ar His Prophet (peace be upon him). In the langua of the Qur'ān, reference of a dispute to judiciary reference to God and Prophet (peace be upon him).

(*vii*) The judges hold their posts according to the settle procedure (constitution) between the people and tl government. But they do no draw their powers fro the constitution. Their powers have been defined l God in the Qur'ān.

فَاحْكُمْ بَيْنَهُمْ بِمَآ أَنْزَلَ اللّٰهُ وَلَا تَتَّبِعْ أَهْوَآءَهُمْ ۔ (المائدۃ : ۴۸)

"Decide their disputes according to the revealed law of

1. Iqbal : *Maqālāt*, p. 101.

God, and do not follow their desires (in this respect)."
(Q. 5: 48).

If the constituent assembly defines the powers of the ıdges and imposes un-Islamic restrictions on them, they are ot bound by it. The appointment is valid but these con-itions are void.[1] In case the judges obey such constitutional rovisions, they follow the desires of others, which has been rohibited by the Qur'ān; and, thus they recognize another ɔurce of law in addition to the Qur'ān, the *Sunnah*, *Ijmā'* and *iyās*. Qur'ān condemns such judges at three different places.

وَمَنْ لَّمْ يَحْكُمْ بِمَآ اَنْزَلَ اللّٰهُ فَاُولٰٓئِكَ هُمُ الْكٰفِرُوْنَ ۔ (المائدہ: ۴۴)

"If any do fail to judge by the light of what Allah hath revealed, they are those who disbelieve."
(Q. 5: 44).

وَمَنْ لَّمْ يَحْكُمْ بِمَآ اَنْزَلَ اللّٰهُ فَاُولٰٓئِكَ هُمُ الظّٰلِمُوْنَ ۔ (المائدہ: ۴۵)

"They are the unrighteous." (Q. 5: 45).

وَمَنْ لَّمْ يَحْكُمْ بِمَآ اَنْزَلَ اللّٰهُ فَاُولٰٓئِكَ هُمُ الْفٰسِقُوْنَ ۔ (المائدہ: ۴۷)

"They are the transgressors." (Q. 5: 47).

The courts derive their power from the Qur'ān. Their ırisdiction is inherent. Mahmūd 'Ālūsī in his commentary ı the Qur'ān, explains the phrase *man lam Yahkum* (من لم يحكم) ; *man lam Yaqḍhi* (من لم يقض) which means those who do not ɔld the court.[2] No provision of any constitution can bestow ırisdiction to the courts or curtail their jurisdiction. In the ords of Coulson:[3]

"To many, indeed, the particular manner in which the jurisdiction of the courts had been confined

1. Abū Ya'alā, *Ahkām us-Sultāniyah*, p. 93.
2. Al-'Ālūsī: *Rūh al-Ma'ānī*, v. 6, p. 151.
3. Coulson: *A History of Islamic Law*, p. 180.

> seemed an altogether illegitimate exercise of the sovereign's admitted power. For this right, they argued, existed in order that the sovereign might distribute different classes of cases as between one court and another, and could not be properly employed so as to deny certain types of claim, tenable under the substative law, any enforcement at all."

The concept of recognizing limitations on the jurisdictic of courts by statutes or constitutions is directly in confli with the concept of Sovereignty of God. In that case parli ment is sovereign and not God. In the Islamic History, clash was faced by the Muslim judges between the sovereign of the Tatārs and the Sovereignty of God. The jurists ar judges fought successful battle of sovereignty. The Tatā used to enforce *Yā'sāq* in their conquered territories. This w a collection of laws compiled by Chengez Khan. The Musli jurists preferred death than giving priority to the provisions *Yā'sāq* over the Qur'ān and the *Sunnah*; because that wou amount to the denial of the Sovereignty of God.[1]

By Constitution, Acts or Ordinances, whatever may b jurisdiction of the courts can be classified. Court can ta cognizance of only that category of cases which has be specified for it. On this principle, Sultan Salīm of Turk issued ordinance for the Judiciary not to entertain suits f possion of properties against the persons in adverse possessi for fifteen continuous years.[2] But any direction whether t courts should follows the *Shari'ah* or other laws, is of legal effect. There is no alternative for the courts except t *Shari'ah*.

In the Qur'ānic terminology, every man-made system *Jāhiliyah* (جاهلیہ). The Qur'ān says about those who like

1. Ibn Kathīr, *commentary on the Qur'ān*, v. 2, p. 180.
2. Ahmed Abual Fatah: *Al-Mu'āmalāt fi Shari'at al-Islāmiyā*, v p. 104.

follow man-made laws in contradistinction to God-given laws,

أَفَحُكْمَ الْجَاهِلِيَّةِ يَبْغُونَ وَمَنْ أَحْسَنُ مِنَ اللهِ حُكْمًا لِقَوْمٍ يُوقِنُونَ ۔ (المائدۃ : ۵۰)

"Do they seek after judgment of ignorance (man-made law) But for a people whose faith is assured, who can gain better judgment than Allah." (Q. 5: 5)

Getting together on un-Islamic provisions is rebellion against the *Two-Nation Theory*. The import of any un-Islamic loyalty will have to be oriented to either Geographical Nationalism (وطنیت) or Racial Nationalism (نسلیت). The Muslims have no jurisdiction to do that or they should disclaim to be Muslims. The judges being custodians of the Divine Law are duty bound to declare such provisions null and void; the Qur'ān says,

تَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَى وَلَا تَعَاوَنُوا عَلَى الْإِثْمِ وَالْعُدْوَانِ ۚ وَاتَّقُوا اللهَ إِنَّ اللهَ شَدِيدُ الْعِقَابِ ۔ (المائدۃ : ۲)

"Help ye one another in righteousness and piety, but help ye not one other in sin and rancour; fear Allah: for Allah is strict in punishment." (Q. 5: 20)

Judiciary before the Prophet (peace be upon him)

Mohammad Shahīr Arsalān in his book *Al-Qaḍhā wal-Quḍhāt* has described three salient features of the judiciary of the Arabs before the Prophet (peace be upon him) came to them.

(*i*) There was no written law to place the reliance. They used to follow ancient customs and some rules of natural justice.

(*ii*) The judgment was not binding. The judges had no measures at their disposal to enforce their finding. It carried only a moral force and the winning party, by using it as a lever, could appeal to others to help in getting the right enforced against the other party. The Arabs had a common practice of helping the

aggrieved party. Verdict of a judge helped a person to assert himself as an aggrieved party. The incident of *Hilfal-Fuḍhūl* was witnessed by the Prophet (peace be upou him) when the Quraish assembled at the house of 'Abdullah bin Judān where they took the oath to help the righteous against the wrong-doers. This incident was before the declaration of the Prophethood.

(*iii*) There was no concept of independence of judiciary. Any person known for his wisdom and experience could be selected for giving a decision over a dispute. The parties could declare dis-satisfaction from his decision and refer the matter to somebody else.

Judiciary in Islam

In addition to the status and role of the Islamic Judiciary as discussed in the light of the Qurā'nic teachings, it is quite distinct in the above mentioned three features of the pre-Islamic Arabs.

(*i*) Reliance is placed entirely and exclusively on the Qur'ān and the *Sunnah.*

(*ii*) the judgment is binding on the parties. To introduce the binding nature of the judgment, the following verse was revealed :

فَلَا وَرَبِّكَ لَا يُؤْمِنُونَ حَتَّىٰ يُحَكِّمُوكَ فِيمَا شَجَرَ بَيْنَهُمْ ثُمَّ لَا يَجِدُوا فِي أَنفُسِهِمْ حَرَجًا مِّمَّا قَضَيْتَ وَيُسَلِّمُوا تَسْلِيمًا۔ (النساء : ٦٥)

"But no, by they Lord, they can have no (real) faith until they make thee judge in all disputes between them. And find in their souls no resistance against thy decisions but accept them with the fullest conviction". (Q. 4: 65)

But this verse is peculiar with the Prophet (peace be upoun him).

(*iii*) During the time of the Prophet (peace be upon him) he was lawgiver, executive head as well as judge. Soon after him judiciary was separated from the execu-

tive and was made independent. This was done for the first lime by Abū Bakr. He appointed 'Umar as the chief justice.

Professor Hitti in his *History of the Arabs* has written that the epartment of judiciary was established by 'Umar, for the first ime, in Islam. This view is absolutely incorrect. This department vas established by the Prophet (peace be upon him) himself. He appointed 'Alī as the judge of Yemen and so was Mu'āḍh ppointed by him. In the books of traditions a chapter is isually devouted to judiciary. This comprises of the traditions vhich describe the obligations of a judge, conditions of his office nd the rules of procedure.

In the light of the teachings of the Prophet (peace be upon iim) Abū Bakr separated judiciary from executive and made t completely Independent. He appointed 'Umar as the chief ustice. 'Umar held this office without any interference from he side of the executive. Ibn 'Athīr writes :

و فیها استقض ابوبکر عمر بن الخطاب و کان یقضی بین الناس
خلافته کلها (ابن اثیر جلد ۲ : ۲٦۰)

"And this year Abū Bakr made 'Umar the judge and he held that office during the whole of Abū Bakr's period" [1]

'Umar could declare the orders of Abū Bakr as unlawful nd could get his orders executed against the latter. Once it so iappened that.

"Two persons Akrā bin Habīs and 'Uyainā bin Hisn came to Abū Bakr and requested for an uncultivated land lying near them. Both of them were non-Muslims of reconciled hearts (مولفة القلوب). Abū Bakr accepted their application and gave them a title deed for the land. The matter was brought to the notice of 'Umar. He summoned them and told them that the

1. Ibn 'Athīr: *Kāmil*, v. 2, p. 260.

Prophet (peace be upon him) used to patronize you (from the sources other than Zakāt) because Islam was weak in those days. He added that in the circumstances they could not get the land. At that, he took the deed from them, tore it off, went to Abū Bakr and put him this question.

"Why have you given this piece of land to these two persons? Is it your property or that of the Muslims?" Abū Bakr replied,

"It is the property of the Muslims, 'Umar."

'Umar—"What right have you got to bestow it on these two persons?"

Abū Bakr—"I consulted the persons sitting by me at that time. But, now, I admit my mistake."

After some time, 'Uyainā, again, approached Abū Bakr and requested to give him another deed. Abū Bakr said,

"I cannot reopen the matter rejected by 'Umar (لا اجدد شيئا رده عمر)."[1]

Throughout the Islamic History the Muslim Judiciary has tried to maintain its independence and loyalty to the *Shari'ah.* The Chief Justice who was responsible for organizing the entire structure of Judiciary, had been exercising the right independent of the head of the State. Out of the fourteen Umayyad heads of state, only four could succeed to manage the succession of their sons. This was due to the effective jurisdiction and intervention of the jurists. The then Chief Justice refused to accept Al-Muqtadar as the head of State as he was minor. Sultan 'Abdul Azīz was impeached by the, then, Sheikh al-Islam for being physically unfit. Abū Hanifā refused to accept the post of the Chief Justice on the ground that he did not feel satisfied that he would be able to execute his orders against the Caliph and his family.[2]

A Muslim jurist, by virtue of his being a jurist, is an autho-

1. Abū 'Ubaid : *Kitāb al-Amwāl*, p. 277.
2. *Al-Isabā*, v. 3, p 56.

:y on Islamic Law. His opinions are binding on the people ho recognize his scholarship. The Qur'ān says,

فَاسْـَٔلُوْٓا اَهْلَ الذِّكْرِ اِنْ كُنْتُمْ لَا تَعْلَمُوْنَ ۔ (الانبیاء : ۷)

Ask the men of learning if you are not certain about anything." (Q. 16 : 43)

During the earlier days of Islam, the words jurisconsult (مفتی) and judge (قاضی) were used synonymously.[1] Later on, the ord judge was specified for the jurist who was formally appointed. The people used to hold the jurisconsults in highter steem than the judges. The former held their position not ue to their office but because they had earned reputation for ieir knowledge. Abū Hanifā, while describing his private gislature of thirty four jurists, placed the jurisconsults above ie judges in the order of precedence. In the modern society a awyer occupies the status of a jurisconsult.

Vestern Judiciary

Montesque, in the 18th century, systematically advocated ndependence of three organs of state. Although the Western udiciary is independent of executive yet it is almost subordinate o the legislature. It is obsolutely loyal to the constitution and he law making agencies. The scope of judicial review arises vhen some law is violated or if some ordinary law making ody over-rides the provisions of the constitution. Being appointed by the people believing in the geographical nationhood (وطنیت), the judges are the product of constitution and cannot aze beyond its boundaries.

On the contrary, the Islamic Judiciary is not the creation f some constitution. The Qur'ān has blessed the jurists with he authoritative position and it inheres in them. Their being n the bench only signifies that they have been given formal gency to get their decisions executed. A Muslim judge is first

1. Sarakhsī : *Mabsūt*, v. 16, p. 109.

of all a Muslim and then something else. He can, at the most, give to the constitution the status of *Ijmā* which in no case can prevail over the Qur'ān and the *Sunnah*. Unless he disclaims to be a muslim, he cannot get out of the *two-nation theory*, and cannot recognize the jurisdiction of any agency to supersede some part of the Islamic Law.

VII—RELATIONSHIP BETWEEN CENTRE AND PROVINCES

The distinction and distribution of power between centre and provinces presupposes conflict of interests between the two. Such a state of affairs is inconceivable in an Islamic State. The power neither vests in the centre nor in the provinces. It vests exclusively in God Almighty. The people, irrespective of their different locales, have to submit before the same law of God. The question arises, why a certain group of people is interested in separate organization and what is the basis of such an organization? It is, however, the right of the people belonging to any part of the Islamic State, to see that government is representative in every respect and it is functioning in the interest of Islam.

The jurists have classified the functions of a state under different heads. The Islamic Law permits (مباح) some of those to be delegated to the provinces. The discussion may be classified as follows :

1. International

At the international level the Islamic State must function as a single entity. The collective obligation of international influence (اظهار على الاديان) and holy war (جهاد) must be performed like one organic whole. The Qur'ān says,

وَاعْتَصِمُوْا بِحَبْلِ اللّٰهِ جَمِيْعًا وَّلَا تَفَرَّقُوْا ۔ (آل عمران : ۱۰۲)

"And hold fast all together, by the rope which Allah (streches out for you) and be not divided amongst yourselves." (Q. 3 : 103)

The precedent of 'Alī is that he preferred resorting to war over letting the province of Syria become independent.

2. Financial

The central treasury (مرکزی بیت المال) comprises of four departments :

(*i*) Spoils of War (غنیمت) and Natural Re-Sources (رکاز).

(*ii*) *Zakāt* (زکواۃ), one tenth of the land revenue from the Muslims (عشر) and customs duty (عشور) from the Muslims as well as non-Muslims.

(*iii*) Land Revenue from the non-Muslims (خراج). Poll tax and emergency Taxes (نوائب).

(*iv*) Unclaimed Property (لقطہ).

The income and expenditure of all the four departments must be maintained separately.

و علی الامام ان یجعل لکل نوع بیتا یخصه ولو ان یستقرض من احدها لیصرفه للاخر ۔ (در مختار جلد ۳ : ۱۷۹)

"And the Goverment shall arrange separate department for each kind. It may, however, allow loan from one department to the other."

It is obligatory that all the four departments shall be maintained in the central treasury.[1]

The people of 'Abs (عبس), Zubyān, Banū Kinanā, Ghatafān and Banū Fazārah tribes refused to pay their *Zakat* to the central treasuary during the Calipate of Abū Bakr. They contended that they would spend their *Zakāt* locally and won't deposit that in the central treasury at Madina. Abū Bakr used force against them and compelled them to hand over their *Zakāt* to the central treasury as they had been doing during the days of the Prophet (peace be upon him).[3]

1. Hifz ur-Rehmān Sūhārwī : *Islām kā Iqtiṣadī Nizām*. p. 125.
2. Ibn Kathīr : *Al-Bidayā wal-Nihāyā*, v. 2, p. 311.
3. Dabūsī ; *Al-Asrār*, p. 151.

3. Administrative

The Islamic State may be divided into the administrative units which may be called provinces. The administrative power may be delegated to the provinces. The governors of the provinces may be appointed with the consent of the local people. The rule making powers which fall within the sphere of consensus (اجماع) and the domain of *technicways* may be delegated to the provincial assemblies (شوریٰ).

The 'Ulemā's, amendment to sectien 9 of the Basic Principles Committee's Report runs as follows :

> "The various Zones or regions of the country shall be cansidered as administrative units of a single state. They shall not be racial, linguistic or tribal units but only administrative areas which may be given such power under the supremacy of the centre as may be necessary for the administrative convenience."

VIII—COMMENTS ON THE CONSTITUTIONS OF PAKISTAN, 1956 & 1962 & 1973

Constitution is a programme settled by the representatives of the people—constituent assembly—which lays down structure and functions of various organs or departments of the state. In Islam its legal status is that of a contract between the government and the people. Its articles are the terms and conditions of the said contract. These terms and conditions are subject to the constitutional principles laid down by the Qur'ān and the *Sunnah*. The representatives of the submittors to the Sovereignty of God—the Muslims—exceed their jurisdiction in case they themselves claim to be sovereign. The superior courts being presided by the jurists have inherent jurisdiction to interpret the legality of the constitutional provisions.

The constitution of any functioning organism or institution is composed of six elements:

(*i*) Raw Material;

(*ii*) Object and purpose for which it is constituted;

(*iii*) Qualifications of its main parts;

(*iv*) Structure or arrangment of the main parts or organs;

(*v*) Function or manner of working of the organs;

(*vi*) Sanction, power or force which makes its parts function.

For instance, in the case of the institution of family; the human beings are the raw material out of whom the institution is to be constituted. Bearing and rearing of children is its main object. Persons of opposite sex should be its constituent parts. The male should be made husband and female the wife, through a socially recognized contract called marriage. The husband should primarily provide maintenance and wife should look after the house and the children. The force which ensures the normal functioning of the institution is three dimensional: personal conviction or belief of the people, the opinion of the reference group—the persons to whom they attach importance, and formal action of the state law.

Similarly, in the case of state, the raw material of its constitution is the people; implementation of the law is its main object; citizens, legislature, executive and judiciary are its main parts. The members of these organs must possess the requisite qualifications. For a democratic arrangement of these organs, independence of judiciary should be maintained. The manner of functioning of these parts should be laid down. Recognition by the people of some sovereign entity is the power or force which makes the institution of state run. The constitutions of the Islamic Republic of Pakistan of 1956, 1962 and 1973 also deal with all the six elements.

1. Islamic Republic of Pakistan has been rightly proposed to be the name of the state. The appellation of this name is to indicate that the will of the people of Pakistan is to lead and organize their lives according to Islam and that the Republic is based on the principles of Islam.

2. The chapters of 'Directive Principles' and 'Principles of State Policy', deal with the objective of the Republic. But cogs have been put into the wheels of the state so that its

machinery may not achieve its goal.

The assurance that suitable steps would be taken fo bringing the existing laws into conformity with the Qur'ān an the *Sunnah*, and that the legislature should not enact an law repugnant to the Qur'ān and the *Sunnah*, is quit insufficient. It should have been stated clearly in so many word that the Qur'ān and the *Sunnah* shall be the chief sources of th law of the land. Article 198(2) of the constitution of 1956.

> "Effect should be given to the provisions of clause (1) only in the manner provided in clause (3)."

and article 8(2) of the Constitution of 1962,

> "The validity of an action or of a law shall not be called in question on the ground that it is not in accordance with the principles of policy and no action shall lie against the state, any organ or authority of the state or any person on such a ground."

amount to accepting the vote of no confidence against Islan Creature is imposing limitations over the powers and jurisdi tion of the Creator. A Muslim can only submit and cann stand before the law of God Particularly, when he sits in th constituent assembly he acts in the capacity of the represent tive of the servants of God. He has no authority but t work out the terms of contract between the government an the citizens—the constitution, according to the constitution provisions of the *Shari'ah*. Any un-Islamic provision passe by the constituent assembly of a Muslim country is *mala fid* without jurisdiction and without any lawful effect.

The most significant object of the Islamic State has not bee enunciated in the Constitutions. The dominating influence Islam over all the ideologies of the world is the prime object the mission of the Prophet (peace be upon him) and the fundan ental duty of every follower of Islam. The Qur'ān says,

هُوَ الَّذِیْ اَرْسَلَ رَسُوْلَهٗ بِالْهُدٰی وَدِیْنِ الْحَقِّ لِیُظْهِرَهٗ عَلَی الدِّیْنِ كُلِّهٖ وَكَفٰی بِاللّٰهِ شَهِیْدًا۔ (فتح : ۲۸)

"It is He who has sent His Apostle with guidance and the Religion of truth, to proclaim it over all religions : and enough is Allah for a witness." (Q. 48: 28).

3. As far as the qualifications and status of the members constituting various organs of the state are concerned, the constitutions lack important ingredients. In the chapter of the Fundamental Rights of the citizens, right of the basic necessities of life (رزق) must be added. The head of the state must possess the qualifications of being a jurist, as well. For all the Muslim members of the legislature, another condition that he is an observer of *Farāiḍh* (فرائض) and desister from *Fawāhish* (فواحش) should also be prescribed. The technique of the election of the members of assembly must be worked out in such a manner that the self-candidature is avoided. In Islam self seeking is a disqualification for holding an office. For the appointment of a judicial office, the qualities of *Taqwā* (تقوی) and *Tadayyun* (تدین) and the knowledge of Islamic laws and learning through original sources should have been made the essential pre-reqiusite. The prescribed oath for holding the offices of executive, legislature and judiciary must read also to the effect that he shall perform his functions in accordance with the *Shari'ah*.

4. Particularly in the Constitution of 1962, the arrangement of state is such that the executive is not completely responsible to the elected reprsentatives of the people. This is absolutely un-Islamic. The immunity of the head of the state and the governors from the legal process is in violation of the Islamic principles of equality before law.

5. The legislative jurisdiction of the Assemblies has not been clearly defined. It should be specified that the legislatures shall not endeavour to pass laws on the subjects which have been provided by the Qur'ān and the *Sunnah*. Only those matters which fall within the scope of *Ijmā'* can become the field of legislation. The financial powers have not been arranged on the Islamic lines. There is no provision to ensure the four

departments of the central treasury.

The jurisdiction of the superior courts should be extended to the armed forces, as well. No person whether he is a civilian or belongs to the military should be debarred from access to the highest courts of justice. If a person is dissatisfied with the decision of the military tribunal, why he should not have the right of appeal to the final court of justice!

Article 156(1) of the Constitution of 1956,

> "Subject to the provisions of the Constitution, the Supreme Court shall, to the exclusion of all other courts, have original jurisdicton in any dispute between. . ."

And article 98(2) of the Constitution of 1962.

> "Subject to the provisions of the Constitution, a High Court of a Province may, if it is satisfied that no other adequate remedy is provided by law."

and article 199 of the constitution of 1973,

restrict, through legislation, the authority of the superior courts. This clearly implies that the legislature, by enacting constitutional provisions, may stop the courts of justice from going into the legality of certain acts. Why the legislature should be afraid of the people going to the courts if the acts of the executive are not according to law ; and why the legislature should think of affording protection to the executive if its acts are not in accordance with law? These provisions smell secular nationalism and aim at favouring the violation of *two-nation theory*.

Attempt to liberate the executive from absolute obedience to the *Shari'ah*, by the representatives of the Muslims is highly deplorable. God has bestowed upon the Muslim jurists inherent jurisdiction to interpert the legal position of every case. In the verse.

فَاسْئَلُوْا اَهْلَ الذِّكْرِ اِنْ كُنْتُمْ لَا تَعْلَمُوْنَ ۔ (الانبیاء: ۷)

"Ask the men of learning if you are not certain about anything." (Q. 16 : 43)

every person has been bound to approach the jurists in the matters which require interpretation. In other words the doors of the men of learning must remain open for everybody indiscriminately. The verse.

أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُولِي الْأَمْرِ مِنكُمْ فَإِن تَنَازَعْتُمْ فِي شَيْءٍ فَرُدُّوهُ إِلَى اللَّهِ وَالرَّسُولِ - (النساء: ٥٩)

"Obey God and obey the Prophet (peace be upon him) and the men of authority ; and in case the dispute arises regarding any matter, refer that to God and the Prophet (as interpreted by the jurists)." (Q. 4: 59)

provides, among others, two things very clearly,

(*a*) The jurists are the representatives of God and His Prophet (peace be upon him). As such, they shall have jurisdiction over all those matters on which God and His Prophet (peace be upon him) have got.

(*b*) The word (شَيْءٍ) carries the sign of *tanwīn* (ٍ) (تنوين) which signifies that the matter may be of any import Moreover, this word is not preceded by *Alif Lām* (ال) which connotes general and unqualified character of the matters in issue without any exception.

Islam, therefore, seriously objects to the wording of the articles and ordains that the phrases 'subject to the provisions of the constitution', must be omitted. Such a phrase was present also in section 186 of the Basic Principles Committee Report which deals with the jurisdiction of the Supreme Court. Thirty three 'Ulema representing all the schools of thought unanimously recommended the deletion of the phrase, "subject to the provisions made by the federal legislature,"

6. These consitutions reflect a confused mixture of Islamic and secular concepts of sovereignity The preambles unequivocally declare,

"Whereas sovereignty over the entire universe belongs to Almighty Allah alone, and the authority exercisable by the people within the limits prescribed by Him is a sacred trust."

But in the articles, the members of the constituent assemblie themselves acted as the sovereigns. They wrongly assume the statuts of the sovereign parliaments who represent th secular societies. Before giving protection to the un-Islami provisions and with-holding practice of the Divine Laws, the should have disclaimed to be the representatives of the servan of God—Muslims. They have tried to eat the cake and hav it, as well. The judiciary being composed of Muslim jurist owe their duty to God to expose this fallacy and declare suc attempts to be without lawful effect.

11

International Law

I—INTRODUCTION

Like all other branches of Islamic Law, the basic sources f the International Law are also the Qur'ān and the *Sunnah.* :he model behaviour of the great Prophet (peace be upon im) throws comprehensive light on all the concepts of the nternationl Law. This is the reason that every book of Islamic urisprudence contains a complete chapter on the International aw.

The term used by the Muslim scholars for the International aw is *Siyar* (سير). *Siyar* is the plural of *Sīrah* (سيرة) which neans conduct. As the International Law regulates interac-ion between the conducts of the Muslims and the non-Muslims, t is termed as *Siyar.*

Muhammad bin Hasan Shaibānī, the famons pupil of Abū Ianifā, is the first scholar in the Human history who wrote comprehensive book exclusively on the law of nations. The ook was named by him as *Introduction to the Law of Nations* (كتاب السير الصغير). The original manuscript has been lost ut the book has been preserved by Shamsal-'Āimmā Sarakhsī n his *Mābsūt* from where Majid Khadduri has translated it nto English and published under the name *The Islamic aw of Nations.* Later on, Shaibānī wrote an advanced book

on the international law. He named that as *A Treatise on International Law.* (كتاب السير الكبير). A commentary was writ on this book by Shamsāl-'Āimmā Sarakhsī in four big volu (شرح السير الكبير).

Oppenheim's Ignorance

While tracing the history of Intertional Law, the West Scholars start with the Greek city-states, then describe Roman period and suddenly shift to the modern times leav the gap of a thousand years about which Oppenheim says:[1]

> "For an Intenational Law there was....no room no need".

The Greek States had two sets of rules: one to observed in relation to the Greek people and the other regard the rest of the world. The latter set of rules was rudiment and scarcely systematised. The Roman Empire consisted many states owing allegiance to Caesars and enjoying inter autonomy. Whenever such states had some dispute with another, the matter was referred to Rome and accord to the Roman International Law, the decisions of Emperor was final. The Roman law recognized no rig for the belligerent and used absolute discretion regarding enemy property. This is what Oppenhiem and others asc as the predecessors of the modern Internationl Law!

There was nothing in the Roman Law on which modern European system could be based; nor did Christia had any such potentails. *Mathew* (*xxvi*, 52) transmits, " the sword into its place, for all that take the sword, s perish by the sword". Therefore, not only the Islamic I of nations was systematically written, taught and practi during th Middle Ages, but also this would be the only possi source of inspiration for the founders of the modern Inter tional Law.

1. Oppenheim: *International Law* v. 1 p. 62.

Influence of Islam on Grotius

Cordova in the West and Baghdād in the East stood as torch bearers of knowledge and students from Europe flocked to these universities and studied the Islamic Law and culture. Luther, several popes and other religious ecclesiastical dignitaries were scholars of Arabic. The early European authors on international law, such as Pierri Bello, Ayala, Vitoria, Gentiles etc. all hailed from Spain and Italy and were the product of the renaissance provoked by the influence of Islam on Christendom. The books of these writers have no counterpart in the Greek and Roman literatures. In the Islamic law we find, for the first time, the full-fledged motive of recognizing rights for the enemy in the times of war as well as peace. We are left with no choice but to accept that these works were merely the echoes of the Muslim works on *Jihād* and *Siyar*.

Grotius, the father of European Law of Nations published his book *De jure belli ac pacis* (Laws of war and peace) in 1625. He has clearly made two indications in this book. Firstly, the practice of his contemporary Christian states of Europe is not the source of his knowlede. He has written in the preface, in his time the Christian nations of Europe behaved in their wars in a manner that even the barbarous would be ashamed of. Secondly, he had gone through the International Law of Islam. He mentions in Chapter X (article 3) of the book that Postliminium was known to Muslim Law.

Scope in the Western World

Article 38(1) (*b*) of the Statute of the International Court of Justice, while spelling out the jurisdiction of the International Court of Justice, says that the court shall apply,

> "The general principles of law recognized by civilized nations".

This article brings the Islamic Law of Nations right within the scope of the present International Administration

of Justice. The International Court of Justice has got the jurisdiction to pronounce judgment on a contemporary international situation in the light of the legal principles of the International Law of Islam, which is recognised by the Muslims who are civilized in every respect.

II—TWO-NATON THEORY

The international law of Islam proceeds on tha basis that there are two nations in the world: the Muslims and the non-Muslims. The persons who submit absolutely to the *Shari'ah* are the Muslims. The rest of the people whether they follow the repealed and corrupted revelations (اهل الكتاب) or patronize the man-made customs and traditions (جاهليه), fall in the category of the disbelievers (كفار). In the eyes of Islam all of them, in spite of their mutual differences, constitute one nation. There is a saying of the holy Prophet (peace be upon him).

"All disbelievers are like members of a nation."

The Western Nationalism (basis of nationhood):

The greatest problem of the Western International Law is a comprehensive definition of a nation which has not been accomplished so far. The 'one state one nation' theory propounded by John Stuart Mill has been discarded. John H. Hertz has undertaken this discussion in his article, *The Ris and Demise of the Territorial State.*[1] David C. Jordan writes:

> "Actor analysis raises a basic problem—how to identify the actor in world politics. In the past it was assumed that the identity of the actor (*s*) was self-evident, the nation state. But is it really that easy to identify who the significant international actors are? May there not be other significant actors beside the nation states? What about the United Nations? What about leaders of religious bodies—the Pope for example? Do they affect the process and nature of the international system with their decisions? When Stalin asked how many Divisions the Pope had, did he not demonstrate an ignorance of significant realities?"[2]

1. *World Politics* : v. 9, (1957) pp. 473-493.
2. *World Palitics in Our Time*, p. 9.

In the study of nationalism we must search for those ;pects, attributes and relationships which uniquely or pre-onderantly mark off one kind of nationalism from the others. he basic question is whether or not there is something *sui :neris* about the phenomenon of nationalism. Failure to con-uct objective and comparative study to identify the nature ıd scope of nationalism has resulted into the fallacy of attri-uting personal aversions or sympathies to the concept of ationalism. Thus, Rābindranath Tagore equates nationalism ith the inequities caused by machine age, its efficiency and s materialistic orientation.[3] Unfortnnately the literature on ationalism lacks any sustained attempt. Dr. Hazam Zaki useibeh says,

> "There has been as yet no systematic or sustained attempt at a comprative study of the phenomenon of nationalism."[4]

Out of the books written on nationalism, Fredrick Hertz's *ationality in History and Politics—A Study of the Psychology and ociology of National Sentiment and Character,* Kedourie's *National-m,* Hans Kohns' *The Mind of Germany* and Earnest Gellner's *Thought and Change* are the most noteworthy works.

The failure of the Western scholars in arriving at a precise efination of nation is due to two reasons. Firstly, the universe f their study has been primarily the societies which lack com-rehensive national culture. A group of people is made senti-ıental about race, language, locale or loyalty to some persons.)uring this process some leadership emerges, which later on ıces the task of socio-political re-organization of the society. 'or this no uniform principle is followed. The ways of filling ı of such vacuum are determined by the will of the leaders. laturally, that varies in every case and makes a general defini-on of Nation impossible. Had they studied the Qur'ān and

3. Tagore, Rabindranath: *Nationalism* (New York 1917) p. 63.
4. Nuseibeh, Hazam Zakī : *The Ideas of Arab Nationalism,* p. 211.

the *Snnnah* they would have found a comprehensive and unifor system of national culture (ملت). Professor K. R. Minogu says,

> "This amounts to saying that the concept of the nation is almost entirely empty of content until a content is arbitrarily supplied from local circumstances. This is the reason why there is so much difficulty in trying to define a nation."[1]

Secondly, they try to search criterion out of the facto which do not have the capacity to become the reservoir of th mind (national culture) of a nation. The factors like rac language, and geography are used by the politicians to arou the masses to direct them towards some channelized goa Otherwise, none of these factors can provide conceptual fram work for the socio-political organization of a group of peopl Again Professor Minogue says,

> "If we treat the subject in this way, we need not break our heads over trying to define a nation. Any single test of nationhood breaks down. In effect each nationalist proposes as the critical test whatever is closest to his heart, for Spaniards Catholicism, but many impeccable nations contain a plurality of religions. Others have taken purity of race. The most popular criterion has been language, the very mention of which provokes us to remember that the Swiss nation speaks four languges.'[2]

Limitations of the Western Nationalism

In the words of Professor Kedouire.

> "The nationalist doctrine pretends to supply a criterion for the determination of a unity of population proper to enjoy a government exclusively its own, for

1. *Nationalism*, p. 154.
2. *Nationalism*, p. 31.
   (While commenting on Renan's definition of nation Minogue sa Renan's conclusion that the nation was ultimately based upon w was, in nationalist terms, a definitional defeat", p. 11.

the legitimate exercise of power in the state and for the right organization of a society of states."

This means that a nationalist doctrine (نظریۂ قومیت) or a ıeory of nationalism must fulfil the following conditions:

'irstly, it provides a criterion,

econdly, that criteron determines the unity of population.

Thirdly, the criterion provides the guidance for the structure and function of formation of a distinct and exclusive political institution.

'ourthly, that guidance is so sufficient and detailed that a self-sufficient structuring and functioning of the socio-political organization is possible.

'ifthly, the criterion gives legitimate and reasonable object for running that organization.

'inally, the criterion provides definite guidelines for the formation of international organization with other states of the world. This condition is essential for the simple reason that no state can remain isolated and must have positive relations with the other states.

The people claiming to be nation, must possess something vith the aforementioned characteristics. All these characeristics are singly as well as jointly indispensable, and nutually so interlinked that the displacement of anyone vould entirely change the nature and shape of the whole uperstructure. As such, the Western societies cease to be ıations in the real sense. None of the criteria like language, erritory, race etc. can fulfil these conditions. The scholars vho work on the subject of nationalism in those societies try o dig mud out of stone. Their problem is like a mirage in the lesert—which shall always remain just ahead.

There is another way of looking at the things. Socio-›olitical organization is the *sine qua non* of a nation. A political ırganization has to be made in two stages—pre-political and ›ost-political. At the pre-political stage unity is suggested, onsciousness of kind is aroused and struggle if needed against

some oppressor, is made to ensure complete self-determination. After that the post-political stage takes its start. This is the stage of consolidation which requires enunciation of a definite object and detailed guidance for the structure and function of an organized political institution. The absence of clear and comprehensive post-political stage causes confusion, chaos and disintegration. The politicians try to retard the process of disintegration by ambiguous slogans and programmes common with groups against whom antagonistic feelings were precipitated at the pre-political stage. In the end it is realized that the whole struggle was unnecessary and without any substance.

Literally, the word 'nation' means a group of people. The Oxford English dictionary cites Ben Jonson's *Sejanus*: 'You are a subtle nation, you physicians.' In the Seventeenth century especially in France and Germany, nation started to stand for the political people of a society. Till the begining of the Nineteenth century Joseph de Maistre defined the nation as 'the king and the nobilitity.' The French nobility had long regarded themselves as racially and morally distinct from the rest of the French population. The people of England did not know before the Nineteenth century anything like loyalty to the country or the nation. All that they knew was that they were the subjects of the king and they lived or died for him. The Queen of England, Elizabeth I, while addressing the army at the occasion of the invasion of the Spanish Armada, appealed to her personal loyalty and to her sense that the realm was in danger. She said,

> "I am come amongst you as you see, at this time, not for recreation or disport, but being resolved in the midst of and heat of the battle, to live or die amongst you all, to lay down for my God and my kingdom, and for my people, my honour and my blood, even in the dust. I know I have the body of a weak and feeble woman, but I have the heart and stomach of a king and of a king of England too, and think foul scorn that Prince of Spain or any other prince of Europe

should dare to invade the borders of my realm. I myself will be your general, judge and rewarder of everyone of your virtues in the field."

The people were promoted to nation by Rousseau in the nineteenth century. E. H. Carr writes,

> "The founder of nationalism as it began to take shape in the nineteenth century was Rousseau, who, rejecting the embodiment of nation in the personal sovereign or the ruling class, boldly identified 'nation' and 'people' ; and this identificatiation became a fundamental principle of both French and American revolutions."[1]

Arnold Toynbee writes that it was in 1775 that the principle of nationality first asserted itself in the modern world as a dynamic political force. Professor Hans Kohn holds that modern nationalism originated in the seventeenth and eighteenth centuries in the north-west Europe and in their American settlements. It become a general European movement in the nineteenth century.[2]

With this transition of the European nationalism from the kings to the people, only the nature of pre-political unity has changed. Formerly, it was achieved by stirring the allegiance to the sovereign kings ; now, it is accomplished by agitating the common bond of blood, language, cutoms, geographical boundary or rudimentary belief. For the post-political organization and stabilization there is no comprehensive national culture. The broad programmes of development, democracy, and socialism are common in almost all the societies ; then, why so much emphasis on the pre-political identity! It rather amounts to contradiction in terms. It is quite possible that the persons belonging to different soils and speaking different languages may prove to be the better collaborators to work for the democratic and other beneficial institutions.

1. *Nationalism and After*, p. 7.
2. Kohn, Hans: *Prophets and Peoples*, New York, 1961, p. 12.

Thirdly, the western nationalism being founded on geographical, racial and linguistic affinity, provides lessons for an endless series of cession. There may be many territorial divisions, there are numerous variations within one race, and there are dialects within a language. If separation from the humanity at large is once justified on these grounds, there cannot be any justification of checking the process from proceeding further.

Lastly, such a nationalism prepares grounds for secularism. In case a society is running or is offered to run just and equitable institutions on the lines of Divine Guidance, the nourishment of 'we' feelings on the ground of territorial, linguistic or racial differences, against that society means revolt against those institutions. What atheism or agnosticism is to an individual, secularism is to a state. It is ridiculous to assume that when the people have to act individually they are bound by the Divine Law, but when they run an institution—the state—they are not bound by it. This is just like saying that a person will normally obey the law, but to form and run a company—the institution of juristic persons—he will not obey it. Such a state of affairs, in the presence of a comprehensive Divine legal system, is revolt or sedition and in the absence of that, it is termed Al-jāhiliyah (ignorance). Technically it will be called Al-Jāhiliyah although man-made customs and rules are followed. Can a mere chance of birth in a particular territory or in a distinct race or in a society speaking a different language, give justification to a group of people to claim exception from following the Divine Law for the organization and function of their political institution! Why the people should have different faith and ideology simply because of the variation in physical environments and languages! The Eskimos use three thousand words for the snow because they spend the whole of their life in the snow. Why the people who scarcely ever see the snow should learn so many names of snow! There seems no reason to believe that the difference in vocabulary should have any bearing on the nature of legal system, as well.

lationalism and Marxism

A Marxist believes in two-nation theory. Marxism divides ıe world into two groups: exploited and exploiters. Kenneth linogue says,

> "Marxism vertically divided the world into exploiters and exploited; nationalism horizontally cut into many distinct nationalities."[1]

In the above quotation, Prof. Minogue has used the word ationalism' in its popular sense which means the division of ımanity on the basis of geographical, linguistic and social fferences. In contradistinction to that, Marxism or the Mar-st Nationalism holds that there are two groups of the people, ıe which is exploiter economically and the other which is .e exploited. The political organization of the exploited ould be accomplished accordingly, irrespective of their colour, rritory or language.

The take over of Russia by the Bolsheviks in 1917 was an ıomaly in terms of the Marxist theory, according to which the volution should have been effected by the proletariat of the ost advanced countries of the Western Europe. It was an ıpredicted chance occurrence, and not the spontaneous :hievement of Marxism, that Russia became the homeland of .e spokesmen of the proletarians.

The political policies of the Marxist Russia, from its very :ginning, reflect the colour of Russian nationalism prevailing 'er Marxism. When the German troops invaded Russia, alin made the maximum use of Russian patriotism. He ıked the Russian struggle with the battles of Russian national :roes like Alexander Navsky and Mekhail Kutuzov. Issac eutscher narrates that during the war with Germany, Stalin id that the Hitlerists were not nationalists but were imperialists, was the Russians who were the real nationalists.[2] The great

1. *Nationalism* (London, 1969), p. 138.
2. Deustcher, Issac : *Stalin*, (London, 1965), 476.

Prophet of Islam (peace be upon him), even at the cruci occasion of the battle of Badr, never invoked the feelings Arab nationalism and did not seek inspiration from the nation heroes of Arabia. He derived the entire moral force exclusive from Islam.

The idea of two nations which was dreamt by Stalin i *Marxism and National Question*, purporting to be a commentar on Marx, could never meet the fate of practice even for a sing moment. His belief,

> "the subsequent development of mankind, accompanied as it was by the colossal growth of capitalist production, the shuffling of nationalities and amalgamation of people within even larger territories, emphatically corroborates Marx's thoughts,"[1]

turned out to be untrue even in highly developed states lik Britain where economic advancement could not, at all, min mize the feeling of British nationalism. The pressure of territ rial nationalism had broken down the ambition of Stalin t establish the economic block of the Eastern Europe. Russia an China are at poles apart from each other due to the territori attitudes, however much they may be camouflaged by dispute about Marxist doctrinal orthodoxy.

Marxism, therefore, by its own force, has not been able, t carve out a single state or change the frontiers of an alread existing state.

Like Territorial Nationalism, Marxism also faces the pr blem of post-political-organization. Territorial Nationalis (وطنیت) unites together the people with the common bonds language, race or geography and then leaves the establishmer and control of the political institution (state) at the will an desire (اهواء و امانی) of the persons who capture the politic power. Marxism also brings together the workers of a certai region by the force of the slogan of exploitation, but the futu framework and management of the government is at the con

1, Stalin :Joseph : *Marxim and the National Question*, p. 39.

lete disposal of the Communist Party. Its authority is unli-nited. Neither Territorial Nationalism nor Marxism provides the uarantee that the coming leadership will run the state on right nd just directions, for the simple reason that those directions ave to be chalked out by the coming leadership itself. If the eople happen to be disappointed, then, there will be no organ r authority to question the legitimacy of any step, except to the xtent and in the manner allowed by the forthcoming leader-hip. Only Islam has the honour of providing a guarantee to he people that if they accept Islam and get together to orga-ize their political institution accordingly, the affairs of the overnment shall be run according to the Qur'ān and the *unnah*. The future interest of the people is as much ensured as hat of a person who joins hands in floating a company and an rest assure that the formation and functioning of the com-any will be subject to the Company Law of the country. This uarantee has not been fully honoured in Pakistan due to, among ther factors, the un-Islamic attitude of the Judiciary and the olitícians. The members of the Judiciary do not realize that hey form organ of an Islamic state. They go on keeping their et in the territorial nationalism inherited from the British overnment. They think that they do not derive their autho-ity from the Divine Law, but from the terms and conditions of he contract of the Constitution framed by the members of the onstituent assembly. They consider that the Muslims who sit on he seats of the constituent assembly cease to be the Muslims or he representatives of the Muslims and assume some super-uman sovereign power parallel to God. By just patronising the eretical concept of territorial nationalism, instead of Islam, he judges fall from the supreme status of the representatives of od and His Prophet (peace be upon him) to that of the inter-retors of those sinful and unrighteous Muslims who by exceeding heir jurisdiction provided un-Islamic provisions in the body of he Constitution.

Nationalism and Islam

'Allāmā Iqbal says;

> "If the object of mankind is peace, integrity and the change of the present social organizations into the one Social System, no Social System other than Islam comes into the mind. According to what I have understood from the Qur'ān, Islam does not only reform the morals of man but also it effects a continuous but fundamental revolution in the social life of the mankind; which altogether changes the nationalistic and racial viewpoint and creates purely human consciousness. The Egyptians, the Greek and the Hindus had nationlist religions. The Jews made it racial. The Christianity taught that religion is a private affair. This made Europe think that religion being a private affair, the organization of the social life of the people is the responsibility of the state. It is only Islam who gave this message to the mankind that religion is neither national nor racial, nor individual, nor private, it is purely human. Its object is to unite all the human beings in spite of their natural distinctions. Such a system cannot be based on nation and race, nor it can be a private affair. It can be based only on the beliefs. This is the only way by which the emotional life and thought of the mankind can be unified and brought under a uniform pattern, which is essential for the constitution and life of a Nation (امت)."[1]

The national feeling starts from the moment when a certain group realizes that they should get united, organise themselves and act together for the achievement of their collective requirements. They formulate institutions to guard and ensure the harmonious function of the collective

1. *Maqālāt-i-Iqbāl* Editor S. A. Wāhid, pp. 224-225.

Note:—At the end of the quotation the word 'Nation' with Capital 'N signifies in this book the Nation based on Islam, as distinguished from nation with small 'n' founded on race, language, geography and political or economic way of life.

orts. It can be said that the society has got a political titution as well. The parallel word for politics in Arabic *Siyāsah* which means looking after the collective affairs of the ople ; the word *Sā'īs* (سائیس) is also from the same root and ans the person who looks after the horses.

A society after having organized all the social institutions comes a nation. If the pre-political consciousness of kind given rise to by the community of colour, territory, economic d political interests, the post-political organization depends on expediency. As a result, the nature and scope of every titutional organization or the nationhood varies in each case d becomes, strictly relative. The people of every nation velope 'we' or 'in-group' feelings about themselves and 'they' 'out-group' feelings about the people of other nations. ong 'in group' feelings cause extreme loyalty to the nation or triotism. Naturally, the people nourish the belief that their tion is the only just and right institution. This is called tionalism (تصور قومیت).

From the ancient times till the present day, there is no ange in the character of nationalism. The Greek, the Roman, Jewish and the Iranian nationalism stood on the same ndations as those of the German, the British and the French tionalism. A simple analysis exposes its superficial and reasonable nature. Can a person, only because of his ticular and peculiar features, be given preference over others? The persons of different colours may prove to be best colleagues for the working of an institution. The sons speaking different languages may have strong equation mind; and the persons speaking the same language may not ve any undestanding at all. Can a reasonable person think a moment that the people living on one side of a mountain good and those living on the other side are bad; or the ags become superior or inferior because of their happening be in the East or in the West? Similarly, no groups of people claim legitimate reality of its economic and political in-

terests over the others. The doors of wealth and resources power cannot remain open to some and closed to the others.

Such an institutional organization is indispensabe for t pursuit of the collective goals, although it is highly unreasonal on the face of it. It is the greatest tragedy of mankind th the human beings are divided into innumerable and antag nistic groups. Unfortunately, the moulds of division are p manent and unbreakable. One race cannot change into t other race. The people speaking one language cannot alt gether stop speaking their language and adopt the other or The geographical differences are physical in nature. T economic interests cannot coincide. Therefore, the nationali based on these criteria is the permanent cause of prejudice a can never be resolved into universal brotherhood. The is no escape from the Divine Guidance; God blessed the ma kind with Universal Nationalism—Islam—and broke all t moulds of nationalism. The nationalism is known in t *Shari'āh* by the name of *Al-'aṣbiyat-al-Jāhiliyah* (العصبية الجاهلية) a God Almighty used the world 'Volcano' for it at one place the Qur'ān.

وَاعْتَصِمُوْا بِحَبْلِ اللّٰهِ جَمِيْعًا وَّلَا تَفَرَّقُوْا وَاذْكُرُوْا نِعْمَةَ اللّٰهِ عَلَيْكُمْ اِذْ كُنْتُمْ اَعْدَآءً فَاَلَّفَ بَيْنَ قُلُوْبِكُمْ فَاَصْبَحْتُمْ بِنِعْمَتِهٖٓ اِخْوَانًا وَكُنْتُمْ عَلٰى شَفَا حُفْرَةٍ مِّنَ النَّارِ فَاَنْقَذَكُمْ مِّنْهَا۔ (آل عمران : ۱۰۳)

"And hold fast altogether, by the Rope which Allah (stretches out for you), and be not divided amongst yourselves; and remember with gratitude Allah's favour on you; for you were enemies and He joined your hearts in love, so that by His grace you became brethren; and you were on the brink of the Pit of Fire, and He saved you from it." (Q. 3: 103)

The holy Prophet (peace be upon him) said.

لا فضل لعربي على عجمي و لا لعجمي على عربي كلكم ابناء آدم ۔ (بخاری و مسلم)

"There is neither preference to an 'Arab over a non-'Arab, nor to a non-Arab over an Arab. All of you

are the descendents of Adam."

e-Political base of Islam

After having discarded all the criteria usually used for the :-political group consciousness, Islam had to give some terial which could perform two functions.

(*a*) it should be able to act as the basis of the pre-political titutional organization.

(*b*) it should be of of universal import.

A comprehensive, uniform and well patterned pre-political ;e is provided by Islam in the following order :—

(*i*) *The Super-Naturalistic View* :—

J. S. Slotkin has defined 'super-naturalism' as.

> "The environmental approach which achieves adjustment by the use of symbols which stand for immaterial powers. Those customs which form a society's Super-natural theory are its dogma; its customary supernatural practices, its rituals."[1]

The environments which are technologically uncontrollable ıld have been too cold for the human beings if God had not l the modes of working of His Supernatural Power in the iverse. The information is imparted to man regarding the ributes of God (صفات الهيه) and His Excellent Names اسماء الحس). He has told that the Universe was created حا) by God. Man is also his creature and there is relation- ɔ between God, Universe and man. Man is expected to ize his free-will in harnessing the Universe according to the tates of God revealed to His Prophets. He keeps in His Eye smallest things and without His permission nothing can ɔpen. Everything is destined to perish and there will be the ;urrection and the Day of Judgement when everybody will re to bear the responsibility for his entire performance in ; world.

1. Slotkin, *Social Anthropology*, New York, 1950, p. 182.

These are the salient features of the Super-natural the of Islam. Its technical name is *Īmān* (ایمان). Sometimes it in the form of a narrative—mythology, and sometimes a for statement—creed. A Muslim believes that the Universe has inherent values. It has got a purpose to serve. He is not a cog in the cosmic machine. He has to act and institutiona his entire life according to the Will of the Creator.

For the development and maintenance of mutual relati ship, interaction is required. To establish and reinforce relationship between God and man, certain modes of behavi have been prescribed by Islam, which may roughly be cal supplication and rituals.[1] Shah Walī-Allah gives them the na of *Ikhbāt* (اخبات). The prayer for five times a day, fasting in month of Ramaḍhān, the pilgrimage etc. provide uniform p tern of behaviour and significant Ethos (شعائر) which materi contribute towards a strong pre-political group consciousness

(*ii*) *The Naturalistic View* :—

While leading a group life in the world, man has to re larize his relationships with the men and the matter. Th are things which have to be done collectively, for which human life is institutionalized. For instance, bearing and re ing of children require establishment of the institution of fam

The organization of the structure of family requires deta and definite principles. After having accepted the Super-na ral theory of Islam, and having adopted the distinct modes supplication a strong 'we' feeling, among the Muslims a 'they' feeling about the disbelievers (کفار) is developed.

مُحَمَّدٌ رَّسُوْلُ اللّٰهِ وَالَّذِيْنَ مَعَهٗٓ اَشِدَّآءُ عَلَى الْكُفَّارِ رُحَمَآءُ بَيْنَهُمْ۔ (فتح : ۲۹)

"The Prophet (peace be upon him) and his followers are deadly strong against the disbelievers and are very kind to each other." (Q. 48: 29)

1. Supplication is the ritual involving social interaction of man Super Human Being.

The group life of the Muslims is entirely on the intellectual footings. The people, belonging to different races, speaking different languages, residing in different parts of the world and having different economic and political interests, can likewise join this group on equal terms. On the other hand, those who embrace Islam and those who do not become Muslims, are mentally poles apart in spite of their common colour, language, geography and worldly interests.

Naturally, the people having different thinkings, cannot have harmonious relationship, nor they are allowed to have; probably due to the same reason the Qur'ān says :

لَا تَتَّخِذُوْا آبَآءَكُمْ وَإِخْوَانَكُمْ أَوْلِيَآءَ إِنِ اسْتَحَبُّوا الْكُفْرَ عَلَى الْإِيْمَانِ وَمَنْ يَّتَوَلَّهُمْ مِنْكُمْ فَأُولٰئِكَ هُمُ الظّٰلِمُوْنَ۔ (التوبہ : ۲۳)

"Do not have cordial relations with your fathers and your brothers if they like disbelief rather than Islam. Those of you who will maintain such relations with them are the transgressors." (Q. 9: 23)

During the period when the group consciousness was relative to the colour, language and geographic contiguity, the institutional organization was also guided by the local expediency (مصلحت). In the circumstances when the group consciousness is entirely intellectual and all-embracing, the institutional organization should not be oriented towards the benefit of a particular race and a limited time. Only God Omniscient can have universal and eternal perspective of mind. He, therefore, dictated the rules on which the family and other social institutions should be organized.

A Muslim believes that God has created and is running the Universe in a well-defined order. Man is part of the Universe. Prefect organization of his life depends upon the harmony of the laws of social organization with the laws of Nature. Social laws with hundred percent prediction and validity cannot be discovered, except through Divine Revelation. For the organization of the family life, the Personal Law of Islam was revealed.

The Law of Tort (جنایت) and Contract controls the manner in which a Muslim should earn his livelihood and control his physical environments.

As far as the universal import of this exclusively intellectual and well patterned pre-political base of Islam is concerned, 'Allāmā Iqbal has beautifully summarised the Prophetic method in this regard.

> "Shah Walī-Allah has a very illuminating discussion on the point. I reproduce here the substance of his view. The Prophetic method of teaching according to Shah Walī-Allah is that, generally speaking, the law revealed by Prophet takes special notice of the habits, ways, and peculiarities of the people to whom he is specifically sent. The Prophet who aims at all-embracing principles, however, can neither reveal different principles for different peoples, nor leave them to work out their own rules of conduct. His method is to train one particular people, and to use them as a nucleus for the building up of a universal *Shari'ah*. In doing so, he accentuates the principles underlying the social life of all mankind and applies them to concrete cases in the light of specific habits of the people immediately before him."[1]

Post-Political Organization of Islam

To watch the healthy and proper working of the pre-political phase of Islam on purely intellectual grounds, a juristic person—political institution—has to be established. If a person does not perform his material obligations, violates the terms of contract, or commits tort again property or person (جنایت), there must be some organized body of persons who may ensure the remedies against such violations. Otherwise, the entire superstructure of the pre-political phase will fall the prey of negligence and anarchy. Such an organized effort is effected through the institution of state.

Sometimes the momentum of the pre-political phase is so

1. Iqbal : *Reconstruction of Religious Thought in Islam*, p. 171.

strong that it automatically culminates into the establishment of an Islamic State. The state of Madina was established by the holy Prophet (peace be upon him) without resort to any formal force. This is why 'Āishā used to say that Madina was conquered by the Qur'ān. But, for that achievement the Prophet (peace be upon him) had put in the toiling efforts of thirteen years at the pre-political stage of organization. The organization of the political institution—the state—has been made obligatory (واجب) on the Muslims mainly for four reasons.

(*a*) If the effectiveness of a social action is not ensured formally, the people are demoralized and their belief in the system becomes weak. The entire skeleton of the institutional organization is without substance and strength ;

(*b*) The pre political group consciousness is meaningful only if the political organization is accomplished. The principles of structuring and functioning of the institutions of state have been discussed in the chapter on the Constitutional Law.

(*c*) In the absence of a strong political institution, nationalism, materially being more expedient at limited level, has stronger appeal for a certain section of the people than the pre-political institutions of Islam.

(*d*) If a Muslim society is politically not organized, the post-political objective of Islam cannot be achieved. The post-political objectives are three in number :

(*i*) For the Implementation of the International Law of Islam, Imperialism must come to an end and there should be no rule by man over man. Responsibility of the world peace has been entrusted by God to the *Ummah*. Imperialism and rule by man over man has been termed by the Qur'ān as *Fitnā* (فتنه), and it is obligatory for the *Ummah* to see that it no more exists in the world.

وَقَاتِلُوهُمْ حَتّٰى لَا تَكُوْنَ فِتْنَةٌ وَّيَكُوْنَ الدِّيْنُ كُلُّهٗ لِلّٰهِ۔ (انفال : ۳۹)

"And fight them all until there is no more tumult or oppression and there prevails justice and faith in Allah altogether and everywhere." (Q. 8: 39)

(*ii*) This can be done only if the *Ummah* enjoys pre-dominant influence in the world. The Qur'ān emphasises that the prime objectice of the mission of the holy Prophet (peace be upon him) is, to attain dominating influence of Islam all over the world.

هُوَ الَّذِيْٓ اَرْسَلَ رَسُوْلَهٗ بِالْهُدٰى وَدِيْنِ الْحَقِّ لِيُظْهِرَهٗ عَلَى الدِّيْنِ كُلِّهٖ وَلَوْ كَرِهَ الْمُشْرِكُوْنَ۔ (الصف : ۹)

"It is He who has sent His apostle with guidance and Religion of Truth to proclaim it over all the ideologies, even though the idolators may detest." (Q. 61: 9)

(*iii*) The universal dominance cannot be achieved unless *Ummah* becomes politically and militarily a super power so that the disbelievers are afraid of it. The Qur'ān says,

وَاَعِدُّوْا لَهُمْ مَّا اسْتَطَعْتُمْ مِّنْ قُوَّةٍ وَّمِنْ رِّبَاطِ الْخَيْلِ تُرْهِبُوْنَ بِهٖ عَدُوَّ اللّٰهِ وَعَدُوَّكُمْ۔ (انفال : ۶۰)

"Against them make ready your strength to the utmost of your power, including steeds of war, to strike terror into (the hearts of) the enemies of Allah and your enemies." (Q. 8: 60)

The three phases of the institutional organization of the *Ummah*; pre-political, political and post-political are, therefore well patterned, harmoniously integrated and mutually interdependent. It is exclusively based on intellectual foundation while the territorial nationhood (وطنیت) and other kinds of nationalism are relative to geographic, linguistic and racial differences.

Problem of terminology

It is significant enough to find out the terms which the Qur'ān has used for the Islamic organization of the social institutions and nationalism. The word *Qaum* (قوم) occurs in 382 verses of the Qur'ān. These verses can be categorized to connote the following meanings.

1. The group of people who are still away from the right path.

(عَلَى الْقَوْمِ الْكَافِرِيْنَ - اَلْقَوْمِ الظَّالِمِيْنَ)

2. The group which comprises of the persons who have embraced the Truth as well as those who are the disbelievers.

قَالَ الْمَلَاُ الَّذِيْنَ اسْتَكْبَرُوْا مِنْ قَوْمِهٖ لِلَّذِيْنَ اسْتُضْعِفُوْا لِمَنْ آمَنَ مِنْهُمْ۔
(اعراف : ۷۵)

"The leaders of the arrogant party among his people said to those who were reckoned powerless—those among them who believed." (Q. 7: 75)

3. The people belonging to certain locality.

وَمَا كَانَ جَوَابَ قَوْمِهٖٓ اِلَّآ اَنْ قَالُوْٓا اَخْرِجُوْهُمْ مِّنْ قَرْيَتِكُمْ۔ (اعراف : ۸۲)

"And his people gave no answer but this; they said; drive them out of your city." (Q. 7: 82)

4. The people governed by certain persons.

وَنَادٰى فِرْعَوْنُ فِيْ قَوْمِهٖ قَالَ يٰقَوْمِ اَلَيْسَ لِيْ مُلْكُ مِصْرَ۔ (زخرف : ۵۱)

"And Pharoah proclaimed among his people saying ; "O' my people, does not the domination of Egypt belong to me"? (Q. 43: 51)

5. The non-believers being addressed by some prophet who is sent by God towards them.

اِنَّآ اَرْسَلْنَا نُوْحًا اِلٰى قَوْمِهٖٓ اَنْ اَنْذِرْ قَوْمَكَ۔ (نوح : ۱)

"We sent Noah to his people with the command to warn his people." (Q. 71: 1)

6. The people speaking the same language.

وَمَآ اَرْسَلْنَا مِنْ رَّسُوْلٍ اِلَّا بِلِسَانِ قَوْمِهٖ لِيُبَيِّنَ لَهُمْ ۔ (ابراهيم : ۴)

"We did not send an apostle except (to teach) in the language of his people, in order to make (things) clear to them." (Q. 14: 4)

7. A section of the believers.

وَمَا كَانَ الْمُؤْمِنُوْنَ لِيَنْفِرُوْا كَآفَّةً فَلَوْلَا نَفَرَ مِنْ كُلِّ فِرْقَةٍ مِّنْهُمْ طَآئِفَةٌ لِّيَتَفَقَّهُوْا فِي الدِّيْنِ وَلِيُنْذِرُوْا قَوْمَهُمْ اِذَا رَجَعُوْٓا اِلَيْهِمْ لَعَلَّهُمْ يَحْذَرُوْنَ ۔

(التوبه : ۱۲۲)

"Nor should the believers all go forth together. If a contingent from every expedition remains behind, they could devout themselves to studies in religion, and admonish their people when they return to them. That thus they may learn to guard themselves against evil." (Q. 9: 122)

8. The believers who have not yet been provided with the detailed guidance to organise their social institutions.

وَلَمَّا رَجَعَ مُوْسٰٓى اِلٰى قَوْمِهٖ غَضْبَانَ اَسِفًا قَالَ بِئْسَمَا خَلَفْتُمُوْنِيْ مِنْ بَعْدِيْ اَعَجِلْتُمْ اَمْرَ رَبِّكُمْ وَاَلْقَى الْاَلْوَاحَ ۔ (الاعراف : ۱۵۰)

"When Moses came back to his people, angry and grieved, he said, Evil it is that you have done in my place in my absence, did you make haste to bring on the judgment of your Lord?" he put down the Tablets." (Q. 7: 150)

9. The rival parties of one state led by different leaders.

وَقَالَ الْمَلَاُ مِنْ قَوْمِ فِرْعَوْنَ اَتَذَرُ مُوْسٰى وَقَوْمَهٗ لِيُفْسِدُوْا فِي الْاَرْضِ وَيَذَرَكَ وَاٰلِهَتَكَ ۔ (اعراف : ۱۲۷)

"Said the chiefs of Pharoah's people ; "Will you leave Moses and his people to spread mischief in the land, and to abandon thee and thy God?" (Q. 7: 127)

10. The people following beguiled heritage (جاهلية)

إِذْ قَالُوا لِقَوْمِهِمْ إِنَّا بُرَءَاؤُا مِنكُمْ وَمِمَّا تَعْبُدُونَ مِن دُونِ اللَّهِ۔ (الممتحنه: ۴)

"When they said to the people ; "We are clear of you and whatever you obey other that God." (Q. 60: 4)

11. The people of a certain race.

فَمَآ ءَامَنَ لِمُوسَىٰٓ إِلَّا ذُرِّيَّةٌ مِّن قَوْمِهِۦ عَلَىٰ خَوْفٍ مِّن فِرْعَوْنَ وَمَلَإِيْهِمْ أَن يَفْتِنَهُمْ۔
(یونس: ۸۳)

"But none believed in Moses except some children of his people because of the fears of the Pharoah and his chiefs, lest they should persecute them." (Q. 10: 83)

12. The people declared to be secular, sovereign and free from any Divine Authority.

قَالُوا بَل لَّمْ تَكُونُوا مُؤْمِنِينَ ۝ وَمَا كَانَ لَنَا عَلَيْكُم مِّن سُلْطَٰنٍ بَلْ كُنتُمْ قَوْمًا طَٰغِينَ۔
(الصافات: ۳۰)

"They will reply ; "Nay you yourself had no faith, nor had we any authority over you. It was you who were a people in obstinate rebellion." (Q. 37: 30)

13. A class of the people.

ثُمَّ أَرْسَلْنَا مُوسَىٰ وَأَخَاهُ هَٰرُونَ بِـَٔايَٰتِنَا وَسُلْطَٰنٍ مُّبِينٍ إِلَىٰ فِرْعَوْنَ وَمَلَإِيْهِۦ فَاسْتَكْبَرُوا وَكَانُوا قَوْمًا عَالِينَ فَقَالُوا أَنُؤْمِنُ لِبَشَرَيْنِ مِثْلِنَا وَقَوْمُهُمَا لَنَا عَٰبِدُونَ۔ (المومنون: ۴۷)

"Then we sent Moses and his brothers Aron, with our signs and authority manifest, to Pharoah and his Chiefs. But they behaved insolently ; they were arrogant people. They said, "Shall we believe in two men like ourselves ? And their people are subject to us." (Q. 23: 47)

The word *Millah* (ملت) is found in the Qur'ān in 15 verses, and signifies the following senses.

1. Mode and Culture, completely harmonious and fully integrated, established by the practice of the apostles of God.

قُلْ إِنَّنِي هَدَانِي رَبِّي إِلَىٰ صِرَاطٍ مُّسْتَقِيمٍ دِينًا قِيَمًا مِّلَّةَ إِبْرَاهِيمَ حَنِيفًا (انعام: ۱۶۱)

"Say ; Verily, my Lord has guided me to a way that is straight, a religion of right social organizations, the path (trod) by Abraham, the true in faith.' (Q. 6: 161)

Radcliff Browne, after analysing all the definitions of 'culture', has concluded that culture is the way of life of a society. In case the culture is the way guided by God it may be called true religion (دین). If the religion has got the potentials of providing principles for the organization of all the social institutions, it is *Dīn-al-Qayyim* (دین قیم).[1]

The religion (دین) of such potentials, when put in actual practice is called *Millah* (ملت). The *millah* established exclusively under the directions of God by a Prophet is *Millat-al-Hanīfā* (ملت حنیفہ)[1] *Hanīf* literally means the person attached to one (God) and detached from every body else. Such a culture (*Millah*) is absolutely unadulterated, hence completely integrated. The word 'culture' cannot be the exact translation of 'millah', for *millah* should have the potentiality of organizing the entire institutions of a society and there may be societies which are so primitive that their rudimentary nature, cannot provide guidance for the formal structures of the institutions. Therefore, 'national culture' can be the appropriate translation of *millah*. The word 'nation' signifies the institutional organization to be its essential element.

2. The national culture (ملت) may be adulterated by misguidance and disbelief. In such cases the word *millah* is followed by the word *Qaum* (قوم), signifying a disintegrated national culture.

1. Mohammad Iqbal: *Maqālāt*, p. 252.

إِنِّي تَرَكْتُ مِلَّةَ قَوْمٍ لَّا يُؤْمِنُونَ بِاللَّهِ۔ (یوسف: ۳۷)

"I have (I assure you) abandoned the ways of a people that believe not in Allah." (Q. 12: 37)

3. Wheresoever it has been ordered to follow a national ulture, it has been emphasised to be the integrated national ulture (ملت حنفیہ) or the national culture laid by the Prophet brāhīm (ملت ابراهیم) Those who take upon themselves to ollow that, have been given the name of 'Muslims'.

مِلَّةَ أَبِيكُمْ إِبْرَاهِيمَ هُوَ سَمَّاكُمُ الْمُسْلِمِينَ مِن قَبْلُ وَفِي هَٰذَا۔ (الحج: ۷۸)

"It is the cult of you father Abraham. It is He (God) who has named you Muslims, both before and in this (Revelation)." (Q. 22: 78)

4. The word *Qaum* (قوم) may follow the word *millah* (ملت), ut the otherwise arrangement is not possible.[1]

The people belonging to different nations (اقوام) and ational cultures, once adopt the truly integrated national ulture (ملت ابراهیم) they are after that called the Muslims or *mmah* (امت) and never a *Qaum* (قوم).

The word *ummah* (امت) is contained in 64 verses of the ur'ān signifying the following meanings :—

1. The people who institutionalize and organize themlves on the plan of certain non-material ideas (*millah*).

وَمِن قَوْمِ مُوسَىٰ أُمَّةٌ يَهْدُونَ بِالْحَقِّ وَبِهِ يَعْدِلُونَ وَقَطَّعْنَاهُمُ اثْنَتَيْ عَشْرَةَ أَسْبَاطًا أُمَمًا۔ (اعراف: ۱۵۹)

"Of the people of Moses there is community who guide and do justice in the light of truth. We divided them into twelve tribes (organized into) communities." (Q. 7: 159)

1. Abū Hanīfā' actually is Abū Millat-al-Hanīfā which means the person ving relations with such a *millah*.

2. Mohammad Iqbal: *Maqālāt*, p. 231.

لَيْسُوا سَوَآءً مِنْ اَهْلِ الْكِتٰبِ اُمَّةٌ قَآئِمَةٌ يَّتْلُوْنَ آيَاتِ اللّٰهِ۔ (آل عمران : ۱۱۳)

"Not all of them are alike, of the people of the Book are a community organized (for the right); they recite the verses of God." (Q. 3: 113)

2. Originally the whole Mankind was an integrated single community which was, later on, dis-integrated because of the differences in beliefs.

وَمَا كَانَ النَّاسُ اِلَّآ اُمَّةً وَّاحِدَةً فَاخْتَلَفُوْا۔ (یونس : ۱۹)

"Mankind was but one community ; they differed (later)" (Q. 10: 19)

3. God has sent through His prophets well integrated model behaviour for every community.

وَلَقَدْ بَعَثْنَا فِيْ كُلِّ اُمَّةٍ رَّسُوْلًا اَنِ اعْبُدُوا اللّٰهَ۔ (نحل : ۳۶)

"For we assuredly sent amongst every community an apostle with the command 'Serve Allah'." (Q. 16: 36)

كَذٰلِكَ زَيَّنَّا لِكُلِّ اُمَّةٍ عَمَلَهُمْ۔ (انعام : ۱۰۸)

"Thus here we harmoniously organized the behaviours for every community."

There may be the community (اُمت) which patronizes the wrong ideas. (Q. 6: 108)

وَقَطَّعْنٰهُمْ فِي الْاَرْضِ اُمَمًا مِنْهُمُ الصّٰلِحُوْنَ وَمِنْهُمْ دُوْنَ ذٰلِكَ۔ (اعراف : ۱۶۸)

"We broke them up into the communities on the earth There are among them some that are righteous, and some that are the opposite." (Q. 7: 168)

كَذَّبَتْ قَبْلَهُمْ قَوْمُ نُوْحٍ وَّالْاَحْزَابُ مِنْ بَعْدِهِمْ وَهَمَّتْ كُلُّ اُمَّةٍ بِرَسُوْلِهِمْ لِيَاْخُذُوْهُ۔ (مؤمن : ۵)

"Before them denied the people of Noah and the groups after them ; and every community plotted against their prophet to seize him." (Q. 40: 5)

4. The birds and animals, because of leading their lives in an organized manner, have been called the communities (امم).

مَا مِنْ دَآبَّةٍ فِي الْأَرْضِ وَلَا طَآئِرٍ يَطِيرُ بِجَنَاحَيْهِ إِلَّا أُمَمٌ أَمْثَالُكُمْ ۔ (انعام : ۳۸)

"There is not an animal on the earth, nor a being that flies on its wings, but forms part of communities like you." (Q. 6: 38)

5. Any association made formally or informally to act in a settled manner is a community (امم).

وَلْتَكُنْ مِنْكُمْ أُمَّةٌ يَدْعُونَ إِلَى الْخَيْرِ وَيَأْمُرُونَ بِالْمَعْرُوفِ ۔ (آل عمران : ۱۰۴)

"Let there arise an organization out of you, inviting to all that is good, enjoining what is right." (Q. 3: 104)

وَلَمَّا وَرَدَ مَاءَ مَدْيَنَ وَجَدَ عَلَيْهِ أُمَّةً مِنَ النَّاسِ يَسْقُونَ ۔ (قصص : ۲۳)

"And when he (Moses) arrived at the watering (place) in Madyan, he found there a group of people watering (their flocks)" (Q. 28: 23)

6. It is incorrect to say that the word *Ummah* literally means a span of time as well. Qāḍhī Shaukānī says:

"Wheresoever the word *ummah* means a period of the time, the *zamān* (زمن) or hīna (حين) has been ommitted as understood."[1]

This is so in the verses ;

وَلَئِنْ أَخَّرْنَا عَنْهُمُ الْعَذَابَ إِلَىٰ (زمن) أُمَّةٍ مَعْدُودَةٍ ۔ (هود : ۸)

"If we delay the penalty for them for a definite term." (Q. 11: 8)

1. Shaukānī : *Fathal-Qadir*, v. 3, p. 29.

وَادَّكَرَ بَعْدَ (حِينٍ) أُمَّةٍ۔ (یوسف : ۴۵)

"He, now bethought him after (so long) a span of time." (Q. 12: 45)

7. A single person competent to act as a model behaviour for the people can be called *ummah.*

إِنَّ إِبْرَاهِيمَ كَانَ أُمَّةً قَانِتًا لِلَّهِ حَنِيفًا (نحل : ۱۲۰)

"Abraham was indeed a model (institution by himself) devoutly obedient to Allah exclusivly". (Q. 16: 120)

The community comprising of all the social institutions is *ummatal-Wahidah* (امۃ واحدہ).

إِنَّ هَٰذِهِ أُمَّتُكُمْ أُمَّةً وَاحِدَةً وَأَنَا رَبُّكُمْ فَاعْبُدُونِ۔ (انبیاء : ۹۲)

"Verily, this Brotherhood of yours is a single Brotherhood, and I am your Lord, therefore, obey me." (Q. 21: 92)

When the institutions of an *ummah* are organised on the principles which represent the interests of all the people of the world for all times to come, it is *ummatal-wasaṭa* (امۃ وسطا).

كَذَٰلِكَ جَعَلْنَاكُمْ أُمَّةً وَسَطًا لِتَكُونُوا شُهَدَاءَ عَلَى النَّاسِ۔ (بقرہ : ۱۴۳)

"Thus, have we made of you a universal and eternal *ummah*, so that you may be the guards of Mankind." (Q. 2: 143)

There is a difference of meaning in the word *wasṭ* (وسط) and *wasaṭ* (وسط). The former means the middle point and the latter indicates any point occurring between the two extremes, which balances the two ends, and signifies the universal and eternal import.

In case the institutions are organized exclusively according to the Divine Guidance, by the Muslims, the community is called *Ummatal-Muslimah* (امت مسلمہ).

رَبَّنَا وَاجْعَلْنَا مُسْلِمَيْنِ لَكَ وَمِنْ ذُرِّيَّتِنَا أُمَّةً مُسْلِمَةً لَكَ۔ (بقرہ : ۱۲۸)

"Our Lord, make us Muslims bowing to Thy (Will), and of our progeny a Muslim *Ummah*, bowing to Thy (Will)." (Q. 2: 128)

The problem of terminology can, thus, be solved in the light he holy Qur'ān. The people having common bond of one a plurality of the attributes like race, territory, language, etc. a *Qaum* (قوم). The body of beliefs, ideas, values, rituals, s, folkways and stateways presented to some *Qaum* or nmunity, organized on some other ideas, is *Dīn* (دين). The terns of *dīn* when acceped by a *qaum* or community for the e of its institutional organization or re-organization be- nes its *millah* (ملت). The society which is the product of *nillah* is an *ummah* (امت). The society in which all the social titutions are interrelated and integrated on the eternal l universal principles revealed by God is *Ummatal-Muslimah* (امت مسلمه). The names: *Ummatal-Muslimah* (امت مسلمه). *matal-Wahidah* (امت واحده), *Ummatal-Wasata* (امت وسطا), . are its attributes. Its real name *Ummatal-Muslimah* has n given by God on the prayer of Ibrahīm (peace be upon n).

The institutional organization (هئيت الاجتماعيه) of every *quam ummah* is relative except that of the *Umma'al-Wasata* being ed on the principles of universal and eternal import, which Absolute. Under these circumstances, particularly when re is lack of proper alternative vocabulary in the English gnage, we can translate *Ummatal-Muslimah* as Muslim Nation h capital 'N'. The English speaking people do not dis- minate between a relative *quam* and a relative *ummah* d use the word 'nation' with small 'n' for both of them. yalty to the Muslim Nation may be called Muslim National- n and the characteristics of its Nationhood shall be determined the Religion (دين) or the National culture (ملت) of Islam, clusively.

The Western nationalism will go on facing the probelm of fining 'nation.' Simple statement that a collection of people

having some common bonds or an idea binding some perso together may be called nation, is not at all workable. It shou be an operational definition which should be able to fix son indicators, the presence of which constitutes nation. If an id attracts the people it should be having the potentials provide guidance for all the three stages of institution organization: pre-political, political and post-politica Nothing can enable the people, outside Islam, fulfil these r quirements. Any haphazard collection of people ma proclaim that it can produce a nation, but all the arrangemen would be rudimentary, relative and timely.

Father of Two-Nation Theory

The author of the concept of the Two-Nation Theory God Almighty. He says that there are two categories Mankind:

هُوَ الَّذِیْ خَلَقَكُمْ فَمِنْكُمْ كَافِرٌ وَّ مِنْكُمْ مُّؤْمِنٌ ۔ (تغابن: ۲)

"It is He Who has created you; and of you are some that are unbelievers, and some that are believers."
(Q. 64: 2)

But the father, in the sense that the person who, for the fir time, vehemently put this concept and established it practicall is Ibrahīm (peace be upon him). The Qur'ān says:

قَدْ كَانَتْ لَكُمْ اُسْوَةٌ حَسَنَةٌ فِیْ اِبْرٰهِیْمَ وَالَّذِیْنَ مَعَهٗ اِذْ قَالُوْا لِقَوْمِهِمْ اِنَّا بُرَءٰٓؤُا مِنْكُمْ وَ مِمَّا تَعْبُدُوْنَ مِنْ دُوْنِ اللّٰهِ كَفَرْنَا بِكُمْ وَ بَدَا بَیْنَنَا وَ بَیْنَكُمُ الْعَدَاوَةُ وَالْبَغْضَآءُ اَبَدًا حَتّٰی تُؤْمِنُوْا بِاللّٰهِ وَحْدَهٗ ۔ (الممتحنه: ۴)

"There is for you an excellent example (to follow) in Abraham and those with him, when they said to their people, 'We are clear of you and whatever you obey besides Allah, we have rejected you, and there has arisen between us and you, enmity and hatred forever, unless you believe in Allah and Him alone."
(Q. 60: 4)

The act of Ibrahīm (peace be upon him) that he declare

e people of the same blood, territory and traditions, belonging a different community only for their patronising a different lief system, has been made an excellent precedent by the ur'ān; and God has graced him with the honour of being lled Father of the Muslims.

مِلَّةَ أَبِيكُمْ إِبْرَاهِيمَ (الحج: ٧٨)

"It is the cult of your Father Abraham." (Q. 22: 78)

III—ISLAM AND THE EVILS OF NATIONALISM

Intrigue against Islam

'Allamā Iqbal has written,

"I could very well understand from the works of the European writers that the Imperialist needs of Europe require that the most effective weapon to dismember the unity of Islam was to make popular the Western nationalism in the Islamic countries. This device, therefore, could gain ground during the World War."[1]

Compromise of Principles

He adds,

"The word 'country' (وطن), as a geographical term is not contrary to Islam. Love of the Father-land is a natural sentiment for which no formal education is required. Now-a-days 'country' has become a concept of Political Science; accordingly, it is a principle of the institutional organization of the Mankind (ہیئت اجتماعیہ انسانیہ). Because Islam is also a law for the institutional organization of the Mankind, therefore, when the word country is used as a political concept; it becomes in direct conflict with Islam. Islam is not prepared to compromise with any other principle of the institutional organization."[2]

1. Mohammad Iqbal: *Maqālāt*, p. 222.
2. Mohammad Iqbal: *Maqālāt*, p. 223.

3. Separation of Religion and Politics

He further said,

"Every un-Islamic system is unreasonable and must be rejected. If some Muslims have got the misconception that Islam can compromise with territorialism as a political concept, I warn the Muslims in time that this way will ultimately lead to either secularism or neglience from the social systems of Islam considering it to be merely a moral code. Religion and Politics would get separated and the former would become only an individual and private affair. This would mean that the Muslims have got two capacities. Individually they are bound by their religion, but collectively for the sake of establishing their institutions they may opt for a system other than Islam. They would cease to be One Organized entity (اُمّة واحدة) based on the Unity of God (توحید) and the Finality of Prophethood (ختم نبوت)".[1]

5. Expediency (مصلحت) Versus Law

What individualism is to nationalism, nationalism is to universal brotherhood. Preference to individual interests o the national interests means lawlessness. Similarly, natio expediency (مصلحت) causes endless feuds and bloodshed betwe different nations. 'Allamā Iqbal pays tribute to the gr Prophet of Islam (peace be upon him) for solving this probl of man:

"Have a glance of the history of man! You will find an endless chain of mutual conflicts, blood-feuds and civil wars. Can such a community (اُمت) be established whose social life is organized for peace and tranquility? The Qur'ān answers in the positive provided that the expression of the Unity of God (توحید الٰہی), in thought and action, according to the Will of God (منشا الٰہی) becomes the motto of man. A great credit goes to the Prophet of Islam (peace be upon him) that

1. Mohammad Iqbal: *Maqalat*, p. 226.

he succeeded in the purge of all self-made preferences and superiorities of colour, language, territory, tribe and heritage, and created one organized Brotherhood (اُمت). The nationalism presumes the impossibility of the universal brotherhood and unity of Mankind."[1]

مذهب او قاطع ملک و نسب
از قریش و منکر از فضل عرب
در نگاه او یکے بالا و پست
با غلام خویش بریک خوان نشست

Relativity of Religions

"Another evil of nationalism is the 'Relativity of Religions' (اضافیت ادیان). This means that the religion is relative to one country and does not fulfil the requirements of the others. This results into nothing but secularism and atheism."[2]

Spiritual Paralysis

"This is the phychological analysis of the ill-fated person who suffers from the spiritual paralysis of nationalism .... The supporters of the territorial nationalism (وطنیت) say, in other words, that it is essential for the Muslim Nation (اُمت مسلمہ) to surrender before the requirements of time (وقت کی مجبوریاں) and may adopt some shape other than the one which has been constituted by the Divine Law (قانون الہی) till eternity (ابدالاباد)[3]

Incomplete Prophethood

"Just as belief in a new Prophet leads to the disbelief (انکار) of the perfection (مکمل - اکمل) of the Prophethood of Muhammad (peace be upon him), the concept of nationalism also proceeds towards the belief that the basic politics of the Muslim Nation (اُمت مسلمہ) is

1. Mohammad Iqbal : *Maqālāt*, p. 236
2. Mohammad Iqbal, : *Maqālāt*, p. 817.
3. *Ibid.*, p. 236.

incomplete."[1]

IV—JURISDICTION

The *Ummah* (Nation) can exercise its lawful jurisdiction in three ways giving rise to three kinds of jurisdiction.

A—Individual

The general exception like the right of private defence, are the circumstances under which the individuals can take the law in their hands. The most peculiar general exception is the case when somebody insults the holy Prophet (peace be upon him) Ibn Taimiyā has written a detailed book, *Al-Sārim-al Muslūl ʿAlā Shātimal-Rasūl* on this subject.

B—Judicial

The jurisdiction of a Muslim Court extends only within the Dāral-Islam—the territory controlled by the Muslims. The territorial jurisdiction of the powers of the Muslim Court can be considered under the following heads:

(*i*) *Muslim subjects at Home*

On the analogy of the Qur'ānic Injunction regarding *Qasr us-Ṣalaṭ*, a foreign Muslim becomes a regular citizen if he stays for more than a fortnight.

(*ii*) *Non-Muslim subjects at Home* (دارالاسلام)

The characteristic features of the non-Muslim subjects are different from those of the Muslim subjects. In many respects the former are more privileged. They are exempt from *Zakat* and compulsory military service. In return to the protection of their life and property and the administration of their personal laws they are required to pay annually *Jizyah* (protection tax). The technical name used for the non-Muslim subjects is *Dhimmīs* (ذمی). There are many exceptions to the liability of *Jizyah*. The woman, the minors, the indigents (محتاج) and those who become invalid due to blindness, sickness

1. Mohammad Iqbal; *Maqālāt*, p. 135.

lunacy and old age are exempted from the payment of *Jizyah*. If a *dhimmī* renders military service voluntarily, he has not to pay *Jizyah* during the years of active service.[1]

In case a *dhimmī* becomes indigent the Islamic State must provide the basic necessities of life to him.

> "Once 'Umar saw somebody asking for charity. He was old. He was a jew. 'Umar took him home and gave him something from his pocket. Then he ordered the cashier of the State treasury to remit his *Jizyah* and fix an allowance for him. 'Umar remarked, 'By God, we shall never be doing justice if we eat out his youth and leave him deserted in old age.' They are one of the beneficiaries of *Zakat*. The term (فقراء) connotes the Muslims and (مسكين) connotes *dhimmīs* who are poor.[2]

Māwardī and Abū Ya'lā hold that the non-Muslim subjects can be appointed to any administrative post provided the ultimate responsibility is assumed by the Muslims. After the defeat of Badr the Meccan disbelievers sent a delegation to Abyssiniya to request the Negus (نجاشی) to hand over the Muslim refugees to the Meccans. In order to counteract the design of the Meccans, the Prophet (peace be upon him) sent Amr bin Umaiyyah ad-Dhamry—a non-Muslim subject, as his envoy to the Negus.

(iii) Muslims in Foreign Territories (دارالكفر)

A Muslim is bound to regulate his conduct according to the laws of Islam wheresoever he may be (المسلم ملتزم احكام الاسلام حيث[3] ما كان) Yet, there is a sharp distinction between the acts committed within the jurisdiction of Islamic State and those committed in the foreign territories. In case of acts of the latter kind a Muslim has got only moral responsibility and a Muslim court has no jurisdiction over him. The reason is that a Muslim state

1. Tabary : *History* v. 1 p 2497.
2. Abū Yusuf : *Kitāb al-Kharāj*, p. 69.
3. Sarakhsī: *Al-Mabsūt*, v. 10, p. 69.

is not responsible to protect the right and property which is nc under its control. The following verse lays down this leg principle.

وَالَّذِينَ آمَنُوا وَلَمْ يُهَاجِرُوا مَا لَكُمْ مِنْ وَلَايَتِهِمْ مِنْ شَيْءٍ حَتَّىٰ يُهَاجِرُوا۔ (انفال: ۷۲)

> "And those who embrace Islam but did not migrate (to the Muslim state) you have no civic relationship with them unless they migrate." (Q. 8: 72)

The state of being domiciled in a foreign territory (دارالکفر disallows the lawful ties which exist between the state and th citizen and between the citizens *inter se*. The Muslims of th Muslim territory and those of the Foreign territory canno marry, cannot inherit and cannot establish the relationship c guardian and ward among themselves. The un-Islamic act o a Muslim being in the foreign territory is a sin and a Muslin court cannot take cognizance of that if he, afterwards, come within its jurisdiction. Ibn Humām says,

> "If two Muslims are in imprisoment of enemy and one of them kills the other, he will not be tried by a Muslim Court. He will be punished in the Hereafter. His status is that of a Muslim who did not migrate to the Muslim territory and, accordingly, his worldly liability and protection ceased to exist".[1]

(iv) Citizens of a Muslim State in Another

All the Muslims belong to one and the same Nation. Every Muslim state is a part of the Muslim territory (دارالاسلام). The moment a Muslim is born in or enters a part of the Muslim territory, he becomes a citizen of all the Muslim territory anc acquires all the rights and liabilities of citizenship. He wil forfeit this privilege in case he has got the citizenship of some foreign non-Muslim territory.

1. Ibn Humān ; *Fathal-Qadir*, v. 4. 451.

(*v*) *Muslim Citizens of a Non-Muslim State*

The Muslim citizens of a non-Muslim state have the legal right to enter the Muslim state and surrender the foreign citizenship. There is, however, one exception to that. In case there exists a treaty of extradition between a Muslim state and a non-Muslim state, the Muslim state is bound to honour the terms of the treaty and shall not allow entry to the Muslims of the non-Muslim state, who had committed a crime over there, otherwise than by the permission of that non-Muslim state. The treaty of Hudaibiyah concluded by the Prophet (peace be upon him) between the Islamic state and the state of Mecca, contained such a clause of extradition which was honoured by the Prophet (peace be upon him) in spite of the fact that the Muslims were subjected to unbearable hardships in Mecca.[1] However, this is not a permanent precedent.

(*vi*) *Domiciled Aliens* (مستأمن) *In Muslim Territory*

The subjects of a foreign state reside in the Muslim territory in accordance with the terms of their passport. A foreigner is under the jurisdiction of Muslim courts. Shaibānī makes a distinction between the rights of God and the rights of men and holds that a foreign non-Muslim will be punished for what is against rights of men such as defamation, murder etc. but will not be punished for doing acts against rights of God such as drinking.[2]

However, the passport will be annulled on the expiry of the prescribed period,[3] on the breach of conditions,[4] on the discovery that the passport was forged[5] or if the alien transmits the secret to the enemy.[6]

The foreigner can institute a suit against a Muslim in a

1. Tabraī : *History*, v. 1, p. 1547.
2. Sarakhsī : *Mabsūt*, v. 1, p. 99.
3. Kāsānṭ : v. 7 p. 110.
4. Sarakhsī : *Sharh us-Siyar*, v. 5, v. 229.
5. Sarakhsī : Mabsūt,, v. 10, p. 93.
6. Abū Yusuf : *Kharāj*, p. 117.

Muslim Court even during the war and even if the Muslims in his country are deprived of this right.

C—Political

The *de jure* political jurisdiction of the Islamic State extends throughout the world. It is one of the prime obligations of the Islamic State to eradicate nationalism and implement 'two-nation theory.' The Qur'ān says,

وَقَاتِلُوهُمْ حَتَّىٰ لَا تَكُونَ فِتْنَةٌ وَيَكُونَ الدِّينُ كُلُّهُ لِلَّهِ۔ (انفال : ۳۹)

"And fight in the path of God until the rule by man over man comes to end and only God is obeyed everywhere". (Q. 8: 39)

In the present context, the word *fitnā* is at four with the modern nationalism wherein the human beings are ruled by the laws made by the similar human beings, and under that garb the locally concocted and coined values are imposed and perpetuated. The word *Dīn* literally means obedience. In the technical language of Political Science, it corresponds to submission to some sovereign. The above verse, therefore, boils down to the meaning that nationalism—the root cause of world problems—must cease to exist, and nowhere any locality, body or person should act as sovereign, for this is the exclusive privilege of God Almighty. The geographical barriers cannot stand in the way of performing this obligation.

The action in this regard must be under the lawful command of the head of the Islamic State. Any step taken by some individual Muslims on their own accord is not in the path of God (فی سبیل اللہ). Mughīrā bin Shu'bā while coming to Madina after embracing Islam, killed a few disbelievers, plundered them and brought their belongings to Madina. He asked the Prophet (peace be upon him) to treat the plunder as war booty and tax the fifth of it in favour of the public treasury. The Prophet (peace be upon him) rejected

1. Cāsāns : v. 7. p. 107.

that for the reasons that it was done on his own initiative and not in pursuance of the orders of the head of the Islamic State. He was not tried for murder and robbery in the Muslim court as he committed the act outside the judicial jurisdiction of the Islamic State.[1]

Comparative Study with Anglo-American System

The British law divides the people into two main categories: British subjects and the aliens. The former are either the natural born British subjects being born of the families loyal to the King or they acquire the British Nationality by passing through certain legal formalities in which they give assurance of their loyalty to the King. The latter are those people who live in the British territory but are loyal to some other state.

The aliens may become the British Nationals, but the British law prohibits the British subjects from acquiring some other nationality while living within the British territory. They cannot, even, revert to their former nationality if they were originally the aliens. This aspect of the British Law is similar to the Islamic concept of Apostasy (الردة).

The status of the aliens in the British Law is somewhat like that of the *dhimmīs* in an Islamic State with the following differences;

1. The aliens, if they enter the country lawfully and respect the British laws, are given protection of life and property. They cannot enjoy any right of citizenship. The rights of citizenship are exclusively for those who are loyal to the King. Islam gives rights of citizenship to the *dhimmīs*.

2. The status of aliens is given to the people who are temporarily settled in Britain. The permanent residents cannot live as aliens. Islam allows the peaceful non-Muslims to live permanently in the Islamic State although they are not

1. Sarakhsī: *Mabsūt*, v. 6, p. 97.

loyal to God and the Prophet (peace be upon him).

V—DIPLOMATIC RELATIONS

The Book *Rusul al-Mulūk wa man yuṣlahu lir-Rasālah was-sajārah* (رسل الملوک ومن یصلح الرسالۃ والسفارۃ) (the envoys of states and who is fit to messengership and embassadorship) by Ibn al Farrā is the first classical work on the subject of Diplomacy. The Prophet's uncle 'Abbās was the secret agent of the Muslim State in Mecca with Mundhir (منذر) and A'naq (اعنق) as his subordinates at Awṭās (اوطاس) and Najd (نجد), respectively. 'Amr bin Umaiyyah Dhamrī was the earliest ambassador of the Muslim State sent to Abyssiniyā in the 2nd Hijrā. He was still a non-Muslim. The non-Muslims, therefore, may be appointed as ambassadors of the Islamic State.[2]

Whenever a foreign enovy or delegation came, there was a sort of Master of Ceremonials who instructed the guests previous to their reception by the Prophet (peace be upon him).[3] The Prophet (peace be upon him) used to receive the foreign envoys in the mosque where the pillar of Embassies (اسطوانۃ الوفود) still commemorates the place. The Prophet (peace be upon him) and his Caliphs put on special dresses at the occasions of the ceremonial reception of envoys.[4] The Muslim envoys disregarded the un-Islamic formalities in the foreign states, particularly prostration.[5]

The gifts presented by the foreign envoys went to the state treasury.[6] The wife of Caliph 'Umar received a gift from the wife of the Emperor of Constantinople which was deposited by the Caliph in the state treasury.[7] The Prophet (peace be upon him) used to present gifts to the foreign

1. Ibn Abdal Barr: Al-Isti'āb, No. 2034.
2. Sarakhsī: *Sharh Siyar al-Kabīr*, v. 1, p. 291.
3. Ibn Hishām: *Sīrah*, p. 619.
4. Ibn Sa'd: *Tabaqāt*, v. 1. p. 153.
5. Ibn Athīr: *Kāmil*, v. 2, p. 359.
6. Tabarī, v. 1, p. 2163.
7. Tabarī v. 1, p. 2822.

nvoys. He once gave five hundred *drachmas* to the envoys of Umān.[1] If a Muslim envoy receives a gift from the foreign uler, that goes to the state coffers.[2]

The envoys were entertained officially. The Prophet peace be upon him) had reserved some houses in Madina for he foreign guests. A building specially earmarked for this urpose was named as Guest House (دارالضيفان.)[3]

The envoys of Abyssiniyā were specially and ceremoneously ntertained by the Prophet (peace be upon him), in recogni-ion of the friendly relations with that country.

The envoys enjoyed complete immunity. The envoys of he imposter Musailimā (مسيلمه) were addressed by the Prophet peace be upon him) as,

> "Had you not been envoys, I would have ordered you to be beheaded."[4]

The delegation of the Christians of Najrān was allowed by he Prophet (peace be upon him) to say their prayers in the ery mosque of the Prophet (peace be upon him).[5] The roperty of envoys is exempt from import duty in Muslim erritory.[6]

In extraordinary cases, the envoys may be detained. The rophet (peace be upon him) detained the plenipotentiary of Mecca, Suhail until the Muslim ambassador 'Uthmān detained n Mecca returned safe to Hudaibiyā, where the Prophet (peace e upon him) was camping.[7]

eaceful Settlement of Disputes

The object of diplopmatic relations is the peaceful solution

1. Ibn Sa'd, *Tabaqāt*, v. 1, p. 40.
2. *Fātāwā 'Ālamgīrī*, v. 4, p. 72.
3. Kattāny: *Al-Tarātīb al-Idriyā*, v. 1, p. 445.
4. Ibn Hīshām; *Sīrah*, p. 955.
5. *Ibid.*, p. 402.
6. Abū Yusuf : *Kharāj*, p. 116.
7. Halabī: *Insānal-'Uyūn*, v. 3, p. 36.

of international differences and the promotion of harmony between different states. The following modes of settlement are recognised by the Islamic Law.

(*i*) *Negotiation*

This is done directly through permanent or special envoys.

(*ii*) *Mediation*

A third party friendly with both the states, uses her good offices to bring the disputants to an amicable settlement. In the first year of Hijrā, an expedition headed by Hamzah was despatched by the Prophet (peace be upon him) against the carvan belonging to the state of Mecca which was then at war with the Muslim state of Medina. Hamzah encountered the enemy party led by Abū Jahl near the sea coast. A fight was imminent but Mājid bin 'Amr who had friendly relations with both the states intervened. Due to his mediation both the parties parted from each other quietly.[1]

(*iii*) *Arbitration* (تحکیم)

Through one or more arbitrators chosen by the parties the difference is determined by the decisions of the arbitrators whose award has been accepted to be binding.[2] The most important precedent of the time of the Prophet (peace be upon him) is the case of the Jewish tribes of Banū Quraizā.

Like other Jews of Medina, a treaty was executed between the Muslims and the jews of Benū Quraizā stipulating that neither they would fight against the Muslims nor they would side with the enemies of the Muslims.[3] But in utter disregard of the terms of the treaty, the Banū Quraizā joined the enemy in the battle of Ditch (جنگ خندق). They made the position of the Muslims too nervous and critical. After the battle was over, the Prophet (peace be upon him) wanted to punish them

1. Ibn Hishām, *Sīrah*, p. 416.
2. *Tājal-'Urūs*, s. *Tahkīm*.
3. *Fathul-Bārī*, v. 7, p. 131.

or their treachery, They initiated the proposal of arbitration and themselves nominated Sa'd bin Mu'adh as the arbitrator, who once was their ally before embracing Islam. The Prophet (peace be upon him) accepted their proposal and honoured the award. The award of Sa'd bin Mu'adh was in accordance with the provisions of the Bible.[1]

Abū Yusuf, while discussing the legality of an award points out :

> "If the parties agree on two arbitrators who differ in the award, it is void, except when both the parties agree to accept the award of one of them. If only one party agrees to the award of one of the arbitrators and not the other, the arbitration is void. If each of the parties agrees to the award of one of the arbitrators, the arbitration is *void.*"[2]

International Trade Relations

The Prophet (peace be upon him) abolished inter-provincial customs duties. The treaties concluded by him with the tribes submitting to his authority stipulate that. Foreign trade, however, was regulated by imposing the taxes. The amount of taxes was determined by express treaties or conventions between the states. One important principle was always adhered to in the international trade relations. The economic benefit and self-sufficiency of the Dāral-Islām has to be safeguarded. The Prophet (peace be upon him) saw one of his companions carrying an armament (arrow) which had been imported from Irān. The Prophet (peace be upon him) prohibited its use saying that equally efficient armaments manufactured in the Muslim territory were available.[3]

VI—HOSTILE RELATIONS

Nature and Scope of Jihād (جہاد)

The object of the International Law of Islam is to ensure

1. 'The Exception', Ch. 20, p. 14.
2. *Kitāb ul-Kharāj*, p. 124,
3. *Mishkāt.*

universal peace. For this purpose the two-nation theory implemented throughout the world. It essentially requires tha the Muslims should organize themselves into a State and th *Ummah* should stand on so powerful footings that it is in position to watch the interests of Islam and deal with th enemies of God everywhere. This entire effort is summarize in the phrase 'Struggle in the Path of God'. (جہاد فی سبیل اللہ)

Path (سبیل) means a trodden way. An untrodden way never a path. The path of God, therefore, means the Laws God in the implemented form or in other words an Islam State. The persons living within the Islamic State are free follow the path of God. Providing free access to the path God for the rest of the people and removing hurdles in the ways to that, is fully covered by the phrase, 'Struggle in th Path of God' (جہاد فی سبیل اللہ)

Patronage of the hurdles and hindrances in the path God is termed by the Qur'ān as 'checking from the path of Go (صد عن سبیل اللہ). One of the verses that spell out the purpose war, ordains war against such disbelievers who check t people from the path of God.

اَلَّذِيْنَ كَفَرُوْا وَصَدُّوْا عَنْ سَبِيْلِ اللّٰهِ اَضَلَّ اَعْمَالَهُمْ ۝ فَاِذَا لَقِيْتُمُ الَّذِيْنَ كَفَرُوْا فَضَرْبَ الرِّقَابِ حَتّٰى اِذَآ اَثْخَنْتُمُوْهُمْ فَشُدُّوا الْوَثَاقَ فَاِمَّا مَنًّا بَعْدُ وَاِمَّا فِدَآءً حَتّٰى تَضَعَ الْحَرْبُ اَوْزَارَهَا ۔ (محمد: ۱، ۴)

"Those who disbelieve God and hinder (men) from the path of God, their deeds will Allah render astray (from their mark). Therefore, when you meet the unbelievers (in faith) smite at their necks ; at length, when you have throughly subdued them, build a bound (on them) : thereafter (is the time for) either generosity or ransom, until the war lays down its burdens."

(Q. 47: 1, 4)

Hindrance from the path of God includes,

1. Attempt to destroy the very path of God. This mea attack on the Islamic State.

2. Enforcement of the Unlawful acts (حرام) and prohi

ons from the Lawful acts (حلال). The societies which imple-ıent by force the ideologies and thought repugnant to Islam, nforce the repealed Divine Laws or provide political power to he un-Islamic group moralities, come under this category. They do not leave their people free to follow the path of God.

In Nationalism, Racialism and all other Fascisms the ıeople are compelled to toe a particular line. The interests of ertain group and class are imposed by force. The relative nterests are asserted to be good and whatever goes against hat is termed as bad and crime. They cannot think in terms ıf good or bad of the humanity as a whole. The imposition of elative moralities causes primitive state of anarchy which is war of all against all for all times—Hobbe's original state of Mankind. The claim of absolute sovereignty by such societies neans, in the words of Bertrand Russell resort to force at international level. The keys of sovereignty must, therefore, ɔe snatched from them and entrusted to the Servants of God.

Such a bondage is termed by the Qur'ān as *Fitnā* (فتنہ). *Fitnā* literally means test or trial. No human body is competent in the eyes of God, to lay down the tests of obedience—laws, and impose them on the people. If somewhere it so happens it must be brought to an end.

وَقَاتِلُوهُمْ حَتَّىٰ لَا تَكُونَ فِتْنَةٌ وَيَكُونَ الدِّينُ كُلُّهُ لِلَّهِ۔ (انفال : ۳۹)

"And fight them on until there remains no more tumult or oppression and there remains submission only to God." (Q. 8: 39)

3. Socialization, education and propagation of the values which are repugnant to Islam. The propagation of un-Islamic values confuses the people, and thus creates hindrance in their way, who would have otherwise caught sight of the path of God and started following that.

The above mentioned hindrances in the path of God cannot be completely eradicated unless the *Ummah* is organised and

empowered to the extent that all un-Islamic forces are sub ordinated. This is the aim and object of struggle (جهاد) an fight (قتال) in the path of God (فی سبیل اللہ). The Qur'ān says,

قَاتِلُوا الَّذِينَ لَا يُؤْمِنُونَ بِاللَّهِ وَلَا بِالْيَوْمِ الْآخِرِ وَلَا يُحَرِّمُونَ مَا حَرَّمَ اللَّهُ وَرَسُولُهُ وَلَا يَدِينُونَ دِينَ الْحَقِّ مِنَ الَّذِينَ أُوتُوا الْكِتَابَ حَتَّىٰ يُعْطُوا الْجِزْيَةَ عَن يَدٍ وَهُمْ صَاغِرُونَ۔ (توبہ : ۲۹)

Fight those who believe not in Allah nor the Last Day, nor hold that forbidden which has been forbidden by Allah and his apostle nor acknowledge the Religion of Truth (even if they are) of the people of the Book, until they pay the *Jihād* with willing submission, and feel themselves subdued." (Q. 9: 25)

The theory of *Jihād*, thus, is a temporary legal device t achieve Islam's ideal public order. The universalization c faith and establishment of God's sovereignty over the world i the ultimate aim. This is the only way to the world peace This goal might be achieved by peaceful as well as by violen means. The *Jihād* is obligatory upon the believers to be carrie on psychologically or militarily, whatever is suitable in particular situation.

The Orientalists

Iqbal has pointed out that the imperialistic tendency c Europe required that they should propagate the European con cept of Territorial Nationalism among the Muslims to vivisec the unity of Islam. One chain of the series of that propagand was introduction of distinction between the offensive an defensive kinds of war into the Islamic literature ; and th assertion that the Islamic wars were defensive in nature. Thi amounts indirectly to acceptance of the territorial nationalism.

The division of the *Jihād* into defensive and offensive i irrelevant and futile. The frontiers of Islam are not geogra phical fronts. It may be offensive as well as defensive. It attack is on the power behind the principles of disbelievers; nc

o snatch their principles from them but to snatch power from heir principles. Its defence is for the purpose of protection nd provision of power to the principles of Islam.

A glaring example of dishonestly diffusing the idea of lefensive *Jihād* into the Islamic literature is Majid Khadduri's vork 'The Islamic Law of Nations'. He has translated Shaibāny's *Siyar* into English and has written a lengthy introluction to his translation in which he has discussed the nternational Law of Islam. During the course of his discussion ne says :

> "The principle that the Jihād was a collective duty imposed upon the community to fight the unbeliever wherever he might be found, retained little of its substance. Ibn Taimiyā (d. 728/1327), with all his fidelity to classical thought, understood the futility of waging a permanent war against disbelief at a time when foreign enemies were menacing at the gates of Islam. He made a concession to reality by reinterpreting the Jihād to mean a defensive war against unbelievers whenever they threaten Islam."[1]

He has referred to Ibn Taimiyā's book *Siyāsat al Shar'iyā*, the exact reproduction of which shall disclose the reality.

العقوبات التی جاءت بها الشریعة لمن عصی الله و رسوله نوعان : احدهما عقوبه المقدر علیه من الواحد و العدد کما تقدم و الثانی الطائفة الممتنعة کالتی لا یقدر علیها الا بقتال فاصل - هذا هو جهاد الکفار اعداء الله و رسوله - فکل من بلغته دعوة رسول الله الی دین الله الذی بعثه به فلم یستجب له فانه یجب قتاله (حتی لا تکون فتنة و یکون الدین کله لله)

و اذا کان اصل القتال المشروع هو الجهاد و مقصوده هو ان یکون الدین کله لله و ان تکون کلمة الله هی العلیا - فمن منع هذا قوتل باتفاق المسلمین - و اما

1. Khadduri, Majid: *The Islamic Law of Nations*. 1966, p. 59.

من لم يكن من اهل الممانعة و المقاتلة كالنساء و الصبيان و الراهب و الشيخ الكبير و الاعمى و الزمن و نحوهم - فلا يقتل عند جمهور العلماء الا ان يقاتل بقوله او بفعله - و ان كان بعضهم يرى اباحة قتل الجميع لمجرد الكفر الا النساء و الصبيان لكونهم مالا للمسلمين - و الاول هو الصواب لان القتال هو لمن يقاتلنا اذا اردنا اظهار دين الله -

(السياسة الشرعية ص ١٠٢ طبع بيروت)

"The punishment to the disbelievers of God and the Prophet (peace be upon him) is of two kinds. One is that punishment which is meant for one or a few of the persons on whom we have judicial jurisdiction. The other is for a powerful society on whom we have no control except by way of decisive war. This is the *Jihād* against the disbelievers, the enemies of God and His Prophet. Every one, whom the call of the Prophet towards the religion of God for which He raised him reaches, and he does not accept it, war against him is obligatory until there remains no oppression and obedience remains only that of God.

And when the basic object of the lawful war is *Jihād*, and its purpose is the establishment of the sovereignty exclusively that of God, and domination of the Word (law) of God. Whosoever causes hindrance in this way must be killed according to the consensus of the Muslims. Those who are unable to create hindrance and fight like women, children, saints, the blind, the disabled and the like should not be killed according to the consensus of the scholars except when they actually take part in the fight against the Muslims by their words or deeds. Though some maintain the killing of all by virtue of their disbelief except the women and children, for they are the property of Muslims, but the former view is correct and true because the war is against those who have ability to fight with us when we want domination of the religion of God."[1]

1. On page 102 of its Edition published in Beriut.

The above statement of Ibn Taimiyā nowhere suggests, defensive and territorial nature of the *Jihād*. It, instead, ocates and asserts the universal character of *Jihād* and cites sensus of opinion on that.

The theory of *Jihād* enunciated by the Bible supports the w that it is not merely defence of the geographical undaries.

> "When thou comest nigh unto a city to fight against it, then proclaim peace unto it. And it shall be, if makes these answer of peace, and open unto thee, then it shall be, that all the people that is found therein shall be tributaries unto thee, and they shall serve thee. And if it will make no peace with thee, but will make war against thee, then thou shalt besiege it; and when the Lord thy God had delivered it unto thine hands thou shalt smite every male thereof with the edge of the sword. But the women, and the little ones, and the cattle, and all that is in the city, even all the spoils thereof, shalt thou take unto thyself; and thou shalt eat the spoils of thine enemies, which thy God hath given thee."[1]

r. Hamīdullah Says:

> "Islam has recognized a certain amount of latitude in personal judgment, and hence the sharp distinction between the Islamic faith. No one is to be forced to embrace the Islamic faith, Islamic rule is to be established by all means."[2]

lassification of Jihad

In fact *Jihād* is *sui generus* but hypothetically it may be lassified into four kinds of lawful wars.

(1) *Defensive*—This is when enemy invades Dār al-Islam.

(2) *Sympathetic*—When the Muslims living in a non-Muslim society seek the help of the Islamic State against their tyrant Government.

1. 'Deuteronomy', XX, p. 14.
2. *Muslim Conduct of State*, p. 168.

(3) *Punitive*—This is the armed action against the organised apostates, rebels, international highwaymen and pirates and the parties who break the covenants.

(4) *Idealistic*—This is for the sake of establishing the universal kingdom of God and subordinating the non Islamic sovereignties to the Sovereignty of God.

Kinds of Hostile Relations

The hostile relations do not actually and necessarily mean actual war. They often fall short of that and may be of the following kinds:

1. Blockade

The supply lines of the enemy are cut. The Prophet (peace be upon him) after migrating to Madina endangered trade routes to Mecca.

2. Reprisals

This is a forcible mode of redress. This may be by way of seizure of the enemy property, detention of the ambassadors, etc. The plenipotentiaries of the Quraish were detained by the Prophet (peace be upon him) at Hudaibiyā.

3. Miscellania

All the pressures which weaken the strength of the enemy are employed. The enforcement of treaties is postponed and the techniques of propaganda against the government of the enemy are devised. During the day of famine in Mecca, the economic aid given to the people of Mecca by the Prophet (peace be upon him), made the Meccan youth against the war-like attitude of their elders towards Madina

4. Open Warfare

The effect of declaration of war is that all able bodied men are considered to be the potential combatants. Nevertheless the Qur'ān emphasizes as follows:

وَلَا يَجْرِمَنَّكُمْ شَنَآنُ قَوْمٍ أَنْ صَدُّوكُمْ عَنِ الْمَسْجِدِ الْحَرَامِ أَنْ تَعْتَدُوا وَ تَعَاوَنُوا عَلَى الْبِرِّ وَالتَّقْوَى ۔ (مائدہ : ۳)

"And let not your hatred of a folk who (once) stopped your going to inviolable place of worship (*Ka'bā*) seduce you to transgress; but help one another with righteousness and pious duty." (Q. 5: 3)

This was revealed about the belligerent Meccans. In spite of that it urges co-operation regarding the matters which are pious and of general welfare. Those may be of the following kinds:

(*i*) *Commercial Relations*

It depends upon the policy of the state what things are to be declared contraband of war and trade. The Prophet (peace be upon him) once sent dates of Madina to Mecca and got hides in return. This was done at the time when hostilities were continuing between Mecca and Medina.[1]

(*ii*) *Trust aud Debts*

When the belligerent co-citizens of Mecca plotted against the life of the Prophet (peace be upon him) and he migrated to Madina, he instructed 'Alī to return all that had been entursted to the Prophet (peace be upon him) by the infidels.[2]

A war broke out between the Jews of Banū Naḍhīr and the Islamic State, in which the Jews were defeated. The Prophet (peace be upon him) ordered their expulsion from the territories around Madina. The Muslims owed debts to them about which the Prophet (peace be upon him) said, "The debts cannot be obliterated on account of war".[3]

(*iii*) *Treaties*

Mere decleration of war does not affect all kinds of treaties

1. Sarakhsī: *Sharh al-Siyar al-kabīr*, v. 1, p. 70.
2. Ibn Hishām, p. 334.
3. Sarakhsī: *Sharh*, v. 3, p. 180.

concluded between the belligerents (متحارب). The matters which have been settled under treaties, for instance demarkation of boundaries, are not affected. Changes may be introduced by the subsequent treaties.

There are treaties which remain dormant during peace, and are enforced only during the war. Such are the treaties for mutual conduct during the war. Shaibānī mentions the treatment of prisoners of war, cutting off the water supplies, devastation of the occupied territories and the like, under this category.[1]

Some treaties may get suspended during the war and are automatically revived at the conclusion of peace between the belligerents.

In the case of the multilateral treaties, the contents of the treaty are the decisive factor. The treaty of Hudaibiyā was of mutilateral character. Some tribes had adhered on the side of Madina while others on the side of Mecca. When the Meccans molested the tribe adhering to the Muslim side, the whole pact of non-aggression and trade facilities was considered to be null and void.[2]

(*iv*) *Treatment of the injured and sick persons*

Acts Forbidden

The following acts are forbidden during the warfare:

(*a*) *Cruel ways of killing.*—The Prophet (peace be upon him) has said,
"Fairness is prescribed by God in every matter; so if you kill, kill in a fair way."[3]

(*b*) *Killing of non-combatants.*—Combatants are those who are physically capable of fighting. Women, minors, hermits, physically disabled, insane, and the like are examples of the non-combatants.

1. Sarakhsī: *Sharh*, v. 1, p. 200.
2. Ibn Hishām, p. 652.
3. Muslim : *Sahih*, v. 2, p. 72.

(*c*) Killing of the prisoners of war.
(*d*) Mutilation of human beings as well as beasts.
(*e*) Unnecessary destruction of harvest and cutting of trees.
(*f*) Adultery and fornication with captive women.
(*g*) Killing of envoys even in retaliation.
(*h*) Massacre in the vanquished territory.
(*i*) The use of poisonous weapons on the people other than the combatants.[1]

ıcts permitted

During the course of war, the following acts are permitted:

(*a*) The combatants must be killed till the enemy surrenders. Kāsānī says:
"And the principle therein is that all those who are potentially capable of fighting may be killed, no matter whether they actually flight or not. And all those who are potentially incapable of fighting actually or potentially, such as by means of opinion, influence, inciting and the like."[2]

(*b*) The all kinds of weapons may be used. Catapults *Manjanīq* (منجنيق), an Arabicisation of the Greek word 'mechanic', was used by the Prophet (peace be upon him) in the siege of Tāif. The Muslims of Spain used in the seventh century of Hijrah what might be considered a crude form of cannon.[3] During the Crusades the Muslims used a kind of Masnic mine.[4] 'Abbās bin Finās (d. 275/888) was the first person who perfected a man-propelled aeroplane.[5]

(*c*) Recourse must be had to powerful propaganda. The Qur'ānic verse relating to the Islamic budget allots a

1. Sarakhī : *Shrah al-Siyar*, v. 3, p. 294.
2. Kāsānī : *Badāi'as-Sanāi'* v. 7, p. 101.
3. Scot, S. P. *History of Moorish Empire in Europe* v. 4, p. 635.
4. Lawrence, *Principles of International Laws*, p. 511.
5. Al-Maqqarī, *Nafh at-Tīb*, v. 2, p. 254.

portion of income for propaganda (المؤلفة قلوبهم) Justic
Abū Ya'lā Farrā writes that this Qur'ānic term in
cludes four categories :

(*i*) Those whose hearts are to be won to help th
Muslims.

(*ii*) To persuade them to abstain form doing harm t
Muslims.

(*iii*) To induce them to embrace Islam.

There are precedents of the Prophet (peace be upon him in which he sent secret agents to cause misunderstaudin between different sections of the enemy.[1]

VII—ENEMY PROPERTY

In principle, all those properties and things which are situ ated in the enemy territory are confiscable (مباح). The Inter natinal Law of Islam, however, divides the enemy propert into two kinds.

1. **Ghanimah** (غنيمت).

"*Ghanīm*" literally means the enemy, and *Ghanīmah* are the movable properties (اموال منقولہ) which are captured by the Muslim army by the force of their armaments during the war operations. The one-fifth (خمس) of the property goes to the general exchequer and the rest four-fifth is distributed among the armed forces who had captured that.

Abū Yusuf defines *Ghanīmah*:

فهذا فيما يصيب المسلمون من عساكر اهل الشرک و ما اجلبوا به من المتاع و السلاح و الكراع ۔

(كتاب الخراج ص ۱۰)

"This is out of those properties which are captured by the Muslims from the enemy army and which are of the kind of riches and armaments."[2]

This means that the Muslim army is not permitted t plunder the civilian population of the enemy.

1. Ibn Hishām, p. 894.
2. Abū Yusuf : *Kitābal-Kharāj*, p. 10.

Fai' (فئی)

Fai' literally means the shadow of a thing in the afternoon.[1] In the International Law of Islam it means such movable as well as immovable properties which come under the control of the Muslim Government in consequence of the victory of the Muslims over a territory. Abū Yusuf says:

و غنيمة العسكر مخالفة لما افاء الله من اهل القرى و الحكم في هذا غير الحكم في تلك الغنائم ـ

(كتاب الخراج ص ٣٨)

"The property captured from the combatant armies of the enemy is different from the *Fai'* which comes under the control of the Muslims from the civilian populations of the enemy."

This cannot be the personal property of anybody and goes to the general exchequer of the state, from where it is spent on the general welfare of the people.

The distribution of the *Ghanīmah* can be done in the Muslim territory only. Mere occupation (استيلاء) does not amount to ownership.[2] Similarly the things falling under the category of *Fai'* cannot be made use of unless the occupied territory is declared to be annexed to the territory of Islam.

The Islamic Law recognizes the right of ownership of the non-Muslims over their properties in the enemy territory. War renders their properties confiscable. But the manner of confiscation is not arbitrary. It is controlled by definite rules of law.

In case the non-Muslims capture the Muslim property and carry that away to their territory, that becomes their ownership and the Muslims lose their rights over that.[3]

The landed property falls under the category of *fai'*. When-

1. Fayyūmī : *Miṣbāhal-Munīr*, v. 1, p. 22.
2. Sarakhsī : *Mabsūt*, v. 10, p. 33.
3. Sarakhsī : *Mabsūt*, v. 10, p. 53.

ever any terms are settled regarding that among the Muslir and the non-Muslims, those must be honoured. Otherwise it the discretion of the Muslim Government to distribute tl occupied lands on the lines of *Ghanīmah*, or preserve that state property. The *Sunnah* of the Prophet (peace be upon hin provides both kind of precedents.[1]

Postliminium

Postliminium is the return of things captured by the enem If anything possessed by the Muslims is captured by the enem and is again taken back by the Muslims, it has to be hand over to the original owner, before the distribution of *Ghanima* If it is distributed before the original owner brought this fa into the notice, he has the prior right of purchase from the ne owner.[2] Grotius has mentioned this principle of Islamic La in his book *De Jure Belli ac Pacis.*

VIII—ENEMY PERSONS

The enemy persons might be found either in the Islam territory or in their own territory, or in the war zone. Trea ment of the enemy persons depends upon the circumstanc under which they come under the control of the Muslims.

(*i*) *Mustā'min* (مستأمن).

Mustā'min is the resident alien enemy. He temporari resides in the Islamic territory by permission. It literally mea one who seeks protection. Such a person is as safe during th war as before.[3] He may return home whenever he likes an take back all his property. The contrabands of war are, course, excepted.[4] If he acts as a spy he forfeits his immunity

(*ii*) *Enemy at home*

The enemy persons putting up in the enemy territory hav

1. Ibn Taimiyā : *Al-Qiyās Shar'ī*, p. 21.
2. Sarakhsī : *Mabsūt*, v. 10, p. 54.
3. Kāsānī, *Badā* , v. 7, p. 107.
4. Sarakhsī, *Mabsūt*, v. 10, p. 21.

to suffer the incidents of siege and war. Their treatment depends upon the terms of surrender or the proclamation of the Muslim commander.

(*iii*) *War Zone*

The Muslim soldier must not kill the non-combatants like women, children, etc. If they are hit unintentionally nobody is responsible.

Prisoners of War

Till the seventeenth-century the prisoners of war were enslaved in Europe. Grotius advised the European nations to release the prisoners of war in exchange or on the payment of ransom. Nobody took notice af his advice for one century. Ransom and exchange started being practised in the eighteenth century. Along with this practice, the mass killing also continued. In 1799 a Turkish army of four thousands was made to surrender by Napoleon with the promise of safety of their life. But he killed all of them.[1]

Former rules regarding prisoners of war were framed in the Brussel's Conference of 1874. The first Hague Conference of 1899 adopted those and the second Hague Conference of 1907, after making some additions, made the Hague Rules as an International Law. The Geneva Convention of 1929 replaced the Hague Rules ; and the Geneva Convention of 1949 superseded those of 1929. The 1949 Convention contains a code of principles for the fate and humane treatment of the prisoners of war. The important rules are :

(*i*) The prisoners of war shall be in the custody of the belligerent state and not that of any individual

(*ii*) Except for the officers, the detaining state can exact labour from them.

(*iii*) The detaining state shall be responsible for their maintenance. The officers shall be paid according to the

1. Allison, *History of Europe*, v. 3, p. 25.

pay scales of the officers of the detaining state, which will be subject to repatriation.

(*iv*) They shall be subjected to humane treatment.

(*v*) They shall obey the laws of the detaining state.

(*vi*) They shall be permitted to perform their religious rites.

(*vii*) Their wills shall be executed.

(*viii*) They should not be exposed to brutality to procure information useful for the conduct of operations.

((*ix*) They should be released and repatriated without delay after the cessation of active hostilities.

(Arts. 118-119).

As a whole, the Geneva Conventions have not made any significant addition to the treatment of prisoners of war prescribed by Islam. The Islamic provisions in this respect are :

(*i*) The prisoners must be fed and well treated until a declaration is reached regarding them.[1]

(*ii*) They are not to be charged for their maintenance. This is to be borne by the capturing Islamic State.[2]

(*iii*) Arrangement is to be made to do away with their discomfiture like sickness, etc.[3]

(*iv*) They have the right to draw up wills for their property at home, which would be communicated to the enemy.[4]

(*v*) The near relatives are not to be separated from each other.[5]

(*vi*) The position and dignity of the prisoners is to be respected.[6]

(*vii*) There is no evidence in the early Muslim history o

1. Abū Yusuf. *Kitābul-Kharāj*, p. 88.
2. Abū Yusuf, *Kitābul-Kharāj*, p. 88.
3. Ibn Athīr, *Kāmil*, v. 2, p. 99.
4. Sarakhsī, *Sharhal-Siyar*, v. 4, p. 229.
5. *Ibid.*, p, 241.
6. Maqrīzī, v. 1, p. 297.

exacting labour from prisoners.[1]

(*viii*) A prisoner cannot be held responsible for mere acts of belligerency.[2]

(*ix*) The prisoners can be tried and punished for crimes beyond the rights of belligerency. The two prisoners of the battle of Badr were beheaded by the order of the Prophet (peace be upon him).[3]

In fact the provisions of Islam are much ahead of the neva Conventions. For instance :

(*a*) The treatment provided by Geneva Conventions is in the nature of a multilateral treaty. The nations agreeing to this, expect corresponding treatment from each other. Islam provided such humane treatment unilaterally, and under the circumstances when the Muslim prisoners were being treated very cruelly by the enemy. Ibn Rushd has recorded consensus of opinion to the effect that a prisoner qua prisoner cannot be killed.[4]

(*b*) The Geneva Conventions recommend facilities which are equal to those available to the armed personnel of the capturing state. On the other hand, the Muslims, under the directions of the Prophet (peace be upon him), contended themselves with dates and fed the prisoners in their charge with bread.[5]

(*c*) No labour is to be exacted from them.

(*d*) The cost of their maintenance is not be repatriated.

nsalvement (استرقاق)

There is no such thing in Islam which conveys the same ea as that of a slave in other societies and civilizations. In

1. Hamīdullah, *Muslim Conduct of State*, p. 216.
2. Dabūsi, *Asrār*, p. 148.
3. Tabarī, v. p. 1337.
4. *Bidāyat al-Mujtahid*, v. 1, p. 351.
5. Tabarī, v. 1, p. 1338.

Islam the parallel concept is *Istirqāq* (استرقاق) which may mor appropriately be translated as releasing the prisoners from ja on probation. A slave (*raqīque*) therefore, is that prisoner c war who is released and kept under the control and supervisio of an individual Muslim. No body other than the prisoners c war can meet this fate. Islam abolished all other ways of en slavement. The prisoners of war who are neither exchange nor liberated against ransom, they are distributed among th Muslims as slaves. They are prisoners by all means except tha they are not put in jail. He has right to equality with hi master in food, clothing and dwelling. Islam gives him mor rights than the rights of a Christian wife. He can seek manu mission in a Court of law on the grounds of non-maintenance hardship and cruelty. He has the right to hold property.

In Roman Law, persons were made slaves :

(*i*) As punishment for crimes or for civil wrongs.

(*ii*) Every prisoner of war was made a slave.

(*iii*) The children of a female slave were slaves of he master. It was immaterial whether the father wa free or a slave.[1]

Slaves were not entitled to the privilege of family life or tc rights of property. A union between a male and a femal slave was not a marriage. The slave had no rights of citizen ship. He was subjected to arbitrary and unlimited authority o his master, and was outside the jurisdiction of the state. Many formalities had to be observed for the manumission. Even afte the manumission the master had the rights of patronage ove the freedom.

The Encyclopaedia of Religion and Ethics defines slavery as:

> "A slave is a human being who is the property of another subject to compulsory labour".

The etymology of the word 'slave' has been described by by Tanṭāwī in his commentary on the Qur'ān.

1. Hunter : *Introduction to Roman Law*, p. 26;

"A particular group of Russian tribes is called *Slav*. The European dacoits used to abduct them and sell them as slaves. They were commonly known in Europe as *Salaf* which meant white complexioned slaves. This word was, Arabicised as *Sqalibi*. The plural is *sqaliba*. It became 'Esclave' in Frence, 'Esklave' in German and 'Slave' in English."[1]

Keeping in view the popular definition and usage of very among the different civilizations of the world, the owing are the essential ingredients of slavery:

(*i*) A slave is a human being.

(*ii*) He is under the absolute and arbitrary authority of his master.

(*iii*) He has no legal rights.

(*iv*) The master can exact any type of compulsory labour from him.

(*v*) Any body could forcibly be lifted and turned into a slave.

Such a concept is absolutely alien to Islam. Amīr 'Alī rightly said:

"It is simply an abuse of words to apply the word slavery in the English sense to any status known to the legislation of Islam. The slavery which was allowed in Islam had, in fact, nothing in common with that which was in vogue in Christendom until the holy war of 1885 put an end to that curse."[2]

In the Islamic literature, we come across the concept of *rqāq* (استرقاق). A *raqīque* (رقیق) is essentially:

(*i*) A prisoner of war who is neither punished for his war crimes, nor exchanged with the Muslim prisoners, nor released with or without ransom (فدیہ).

(*ii*) He is set at liberty on probation and given under the ownership and control of a Muslim who can exact

1. *Jawāhir-ul-Qur'ān*, v. 21, p. 156
2. *The Spirit of Islam*, p. 93.

reasonable and humane service of him and is respo
sible, in exchange, for his equally good food an
clothing. He is at liberty in the sense that he is n
in jail.

(*iii*) The bondage of probation is alienable. The alienatio
is only that of bondage.

(*iv*) He has the legal right of seeking manumission (حق
in a court of law on the grounds of hardship, cruel
and improper maintenance.

(*v*) The words commonly used for him are boy (فتیٰ
servant (خادم) and companion (مولیٰ) when set fre
The word '*Abd*' (عبد) is used as the antonym of a fr
man (حر), otherwise the Prophet (peace be upon hin
prohibited its independent use for a *raqīque* becase
signifies the idea of worship (عبادت).[1] The Qur'ā
usually calls him the person whom your right han
possesses (ما ملکت ایمانکم).

(*vi*) He has got equal criminal rights. Anybody wh
commits his murder shall be awarded capit
punishment.[2]

(*vii*) His civil liability is half of that of a free man. Th
is in recognition of the fact that he is subordinate t
some body and he cannot be equally responsible.[3]

(*viii*) His testimony is admissible in evinedce.[4]

(*xi*) He has the right to hold property.[5]

(*x*) He has right to get married and ejoy family life. H
marriage with a free woman is lawful.[6]

(*xi*) Just as a wife has right to seek *Khul'*, a *raqīque* can ge
himself free from the bondage by offering a certai

1. Abū-Dawūd v. 1, p. 251.
2. Jassās Rāzī, *Ahkāmal Qur'ān*, v. 1, p. 158.
3. Shah Walī Allah *Hujjat al-Bālighah*, v. 2, p. 120.
4. Būkhārī v. 2. p. 162.
5. Saīd Ahmed Akbarabādī *Ar-Rique fil Islam*, p. 185.
6. Baiḍhāwī, *Commentary on the Qur'an*, p. 205.

consideration to his master. This is called *Mukātabah* (مكاتبت). The Qur'ān says:

وَالَّذِينَ يَبْتَغُونَ الْكِتَابَ مِمَّا مَلَكَتْ أَيْمَانُكُمْ فَكَاتِبُوهُمْ إِنْ عَلِمْتُمْ فِيهِمْ خَيْرًا (النور: ٣٣)

"If any of those whom your right hands possess, ask for a deed in writing (to enable them to earn their freedom for a certain sum) give them such a deed if you know any good in them." (Q. 24: 33)

The distinction between th Islamic and other slaveries ın be summarised in the words of the Sa'ūdī Ambassador iyāḍh al-Khatīb, "In other slaveries the choice is between eedom and slavery; if the captive were not made a ave, he would have been a free person. In Islamic slavery ıe choice is between death and slavery; if the captive were ot made a slave, he would have been killed."

Istirqāq is nethier obligatory (واجب) nor recommended (مستحب); it is only permitted (مباح) in the Islamic law as one of ıe fates of the risoners of lawful war (جهاد). This was recognized ue to the absence of any convention of exchange of prisoners etween the belligrent states. Even today, if there is no recogized convention of treaty of exchange and release of the prisoers, and the other states resort to enslavement of the Muslim risoners, *istrīqāq* will be lawful for the Islamic State. Its ınction is the maintenance of political balance between the slamic and non-Islamic States; and it may be as much requird today as it was during the early days of Islam. It affords rotection to the prisoners of war who were neither exhanged nor ransom was paid to the Islamic state on their ehalf.

In case a bilateral or multilateral treaty like the Geneva Conventions, is effected between the Islamic and the other states or exchange and release of the prisoners, the permission (اباحت) of *Istirqāq* as a political device will be suspended. The provisions of such a treaty become obligatory (واجب). Ibn Hajar narrates from Ahmed bin Hanbal.

"If the Muslims have got the prisoners and the non-Muslims too have them, and both of them agree on their exchange (بتادات) it must be done."[1]

Release and Exchange

According to the Qur'ān the prisoners of war may eith be released gratuitously or on ransam (فديه). The Proph (peace be upon him) liberated them on various kinds ransom and compensation.[2] The literates out of them we required to teach reading and writing to the illiterate Muslin Some times money, armaments and other goods were accepte It is immaterial whether the ransom is paid by the prison from his own pocket or by his government. On many occa sions the Prophet (peace be upon him) ordered for gratuito release of the prisoners. Many of the prisoners of Badr we released gratuitously.[3]

The exchange of prisoners is also a kind of ransom. Tl practice of exchange is traceable in the life of Prophet (pea be upon him). It is not necessary that exchangeable prisone should be equal in number on both the sides.[4]

IX—TREATIES

The war comes to an end in the following ways:

1. The parties cease hostilities without reaching o any agreement or coming to any decisive resul Either both the parties are exhausted or the victorio party is not competent enough to subjugate th vanquished one. This is the state of temporar armistice, and hostilities may get revived any tim The battles of Badr, Uhud, the Ditch and Mūta fought by the Prophet (peace be upon him) are i examples.

1. Ibn Hajar: *Fath al-Bārī*, v. 6, p. 125.
2. Ibn Hishām, p. 462.
3. Tabarī, v. 1, p. 1354.
4. Muslim, *Sahīh* v. 5, p. 150.

2. The enemy is defeated and its territory is annexed. This happened in the conquests of Mecca and Khaibar. If terms agreed upon before the enemy surrendered unconditionally, as the people of Khaibar offered some terms regarding life and property, those are honoured.
3. The enemy is so pressurized by the military might of the Muslims that it declares to surrender its sovereignty and is prepared to accept the suzerainty of the Islamic State. No actual war precedes the negotiations. The States of Najrān, Fadak, Taimā and Ailah made submission of this kind. They paid annual tributes (خراج) to the Islamic state, and their right of local government was recognized.
4. The enemy embraces Islam. It so happened in the cases of Bahrain, 'Umān and Ghassān.
5. The differences are settled in a formal treaty while both the parties retain their independence.

Nature of Treaty

The entire edifice of the Islamic politics is raised on the foundation that the sovereignty vests exclusively in God Almighty and no other entity can be recognized as a sovereign body. This is the fundamental belief of every Muslim which makes a perpetual treaty with the non-Muslims unthinkable, it is in the Qur'ān:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَتَّخِذُوا الْيَهُودَ وَالنَّصَارَىٰ أَوْلِيَاءَ بَعْضُهُمْ أَوْلِيَاءُ بَعْضٍ ۚ وَمَن يَتَوَلَّهُم مِّنكُمْ فَإِنَّهُ مِنْهُمْ ۗ إِنَّ اللَّهَ لَا يَهْدِي الْقَوْمَ الظَّالِمِينَ ۔ (المائدہ: ۵۴)

'O ye who believe take not the Jews, and the Christians for friends. They are friends for one another. He among you who taketh them for friends is one of them. Lo! God guideth not wrong doing folk. Your friends can only be God and Muslims and those who believe. (Q. 5: 54)

The Prophet (peace be upon him) implemented th Qur'ānic Command by declaring of those treaties which d not specify the time limit as null and void. He, howeve proclaimed the validity of those treaties which were for specified period.[1]

The Muslim jurists unanimously hold that treaties of frien ship cannot be concluded with non-Muslims for un-limite period. To achieve ultimate goal of the international law Islam—the 'two-nation theory'—the treaties for definite peric can be executed during the intermediary stages. Most of th jurists are of the opinion that the maximum period of a treat should be 10 years. They rely on the precedent of the treaty Hudaibiyā. The Mālikite jurists, however, allow a treaty peace with the non-Muslims which exceeds even 10 years but of a definite period.[2]

Effect of Treaty

1. The disputed points are settled.
2. The rights of belligerency are ceased.
3. The prisoners of war are exchanged and released.
4. The treaties suspended during the war are automatically revived.

Elements of Treaty

Keeping in view the *Sunnah* of the Prophet (peace be upo him) and relying on the analogy of the Qur'ānic comman regarding the contract of debt,—

إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَىٰ أَجَلٍ مُسَمًّى فَاكْتُبُوهُ ۔ (البقرة : ٢٨٢)

"When ye contract a loan for a fixed term, record it in writing." (Q. 2: 281)

Shaibānī and other jurists hold that a treaty must be in writing. All the matters which have been settled, and mode o

1. Dr. Hamīd-Allah: *The Muslim Conduct of State*, p. 269.
2. Suhailī, *Raudhul-Unuf*, v. 2, p. 229.

their observance and execution must be specifically put into black and white. The dates, the duration of treaty and the signatures of the authorized persons must be put into the body of the treaty. The annexes, supplements, provisos and secret sections may also be maintained.

Ratification of Treaty

Normally the treaties are negotiated by the heads of the state or their representatives. In the absence of the authorised persons the provisional treaty can be settled which is subject to be ratified by the competent authorities. Khalid bin Walid concluded a provisional treaty in Yeman which was later on ratified by the Prophet (peace be upon him).[1]

The ratification might be denied and provisional treaty, therefore, is nullified. Once the Prophet (peace be upon him) himself concluded a pact with the proviso that it would be ratified after consulting the pillars of the state. As a matter of fact they rejected the terms and the provisional treaty was declared to be null and void.[2]

Interpretation of Treaty

The golden rule for the interpretation of the treaties has been summarised by Shaibānī which is as follows :—

> "There are things which may be taken for granted by Muslims even without express mention by them, but other nation may not employ them. Such things may be expressly mentioned, otherwise the contracting party may conclude that there is an infringement of the pact. As we have mentioned, the document must be written in a way to bear witness against the contracting party, and no accusation of perfidy should be possible. In the absence of express terms the universal presumptions must be honoured.[3]

The treaties may be amended any time by the mutual

1. Ibn Hishām, p 259.
2. Ibn Hishām, p. 676.
3. Sarakhsī, *Sharh*, v, 4, p. 64,

consent of the contracting parties. If any of the parties is of the view that the treaty has become impracticable due to the changed circumstances, and it is of the view that the treaty must be renounced, it can do so by informing the other party of its intention and by giving a notice of reasonable time to the other party.

Classical Treaty of Hudaibiyā

It will be useful to give a brief background, complete text and some analysis of the treaty of Hudaibiyā between the Prophet (peace be upon him) as head of the state of Madina and the Quraishite representative of the state of Mecca.

After completing six years of migration, the Prophet (peace be upon him) went to perform the ceremony of piligrimage (*'Umrā*) to Mecca which was in strong hold of the enemies of God at that time. The Jewish State of Khaibar in the north and Quraishite State of Mecca in the south were in collusion against the Islamic State of Madina. In case of attack by the Muslims on Mecca, the Jewish storm over the State of Madina was certain. Similarly, in case of attack on Khaibar something was expected from the Meccans. The Muslims were not powerful enough to meet successfully both the frontiers. Secondly, the Iranians just had a crushing defeat at the hands of the Romans, and it was high time to suspend the inter Arabian disputes and get the territories of Bahrain, 'Umān and Yeman liberated from the Iranian Yolk.

To have a free hand regarding Khaibar and Iran, the Prophet (peace be upon him) decided to concede with the Meccans, terms which were patently derogatory to the prestige of the Muslims.

Thirdly. a few clauses which could serve the purpose of face saving for the exhausted and famine ridden Quraishite of Mecca could bring them to terms. In doing so the unprejudiced youth of Mecca could be influenced by the peace loving and principled observing attitude of the Muslims. The object of visiting the House of God and observing the ceremony of Pilgrimage could

also be achieved by mere postponement of another one year.

With such a far sighted background, the wisest man on the surface of the earth, the Prophet of Islam (peace be upon him) accompanied be 1400 Companions camped at Hudaibiyā, near the city of Mecca, negotiated the following treaty :—

Text of the Treaty[1]

"With Thy name, O' God :

This is what was agreed upon between Muhammad, son of 'Abdullah and Suhail, son of 'Amr :

They both agree to put down fighting on the part of the people for ten years, during which period the people were to enjoy peace and refrain from fighting with each other.

And whoever of the Companions of Muhammad comes to Mecca on Hajj or 'Umrah—pilgrimage, or in quest of the bounty of God (*i.e.* commerce, Qur'ān lxii. 10) en-route to Yeman or Tāif, such shall be in security regarding his person and property. And whoever comes to Madina, from among the Quraish, en-route to Syria or 'Irāq (variant : Egypt) seeking the bounty of God, such shall be in security regarding his person and property.

And the person who comes to Muhammad from among the Quraishites without the permission of his guardian (*mawlā*), he (*i.e.* the Prophet) will hand him over to them ; and whoever comes to the Quraish from among those who are with Muhammad, they will not hand him over to him.

And that between us is a tied-up breast (*i.e.* bound to fulfil the terms), and that there shall be no secret help violating neutrality, and no acting unfaithfully.

And that whosoever likes to enter the league of Muhammad and his alliance may enter into it ; and who likes to enter the league of the Quraish and their alliance, may enter it. And thereupon upsprang the tribe of Khuzā'ā and said :

"We are in league with Muhammad and his alliance;

1. Ibn Hishām, p. 747.

and upsprang the tribe of Banū Bakr and said: "We are in league with the Quraish and their alliance."

And that thou (Muhammad) shalt return from us (Quraish) in this year and enter not in our midst; and that when it is the coming year, we shall go out from thee and thou shalt enter with thy Companions and stay there three nights, with thee being the weapon of the rider ; having swords at the side, thou shalt not enter with what is other than them (swords).

And that the animals of sacrifice (bought by thee) will be slaughtered where we found them (*i.e.* in Hudaibiyah), and thou shalt not conduct them to us in Mecca)"

Seal of Muhammad and
Seal of Suhail

Witnesses

Muslims : Abū Bakr, 'Umar, Abdur-Rahmān ibn 'Awf 'Abdullah ibn Suhail ibn 'Amr, Sa'd ibn Abi Waqqāṣ, Mahmūd ibn Maslamah etc.

Maccans : Mikrāz ibn Hafs, etc.

Scribe and witness : 'Alī Ibn Abī Ṭalib.

Two copies of the treaty were prepared. One was kept by the Prophet (peace be upon him) and the other was handed over to Suhail, the plenipotentiary of the Quraish.

The following are the salient features of the Treaty :

1. This is a multilateral treaty.
2. The only clause of the treaty which appeared derogatory to the prestige of the Muslims is regarding the one-sided extradition. It soon became manifest upon the Meccans that it was expensive and incovenient for them. On their request the Prophet (peace be upon him) gave consent to amend the treaty in this respect.[1]
3. The strong-hold of the Jewish conspiracies against the

1. Ibn Hishām p. 752.

Muslims—Khaibar—was uprooted. The Meccans had to remain neutral under the treaty.

4. The Iranian colonies of Yeman, Bahrain and 'Umān were liberated after the treaty.
5. The main object of visiting Mecca was to perform the *'Umrā* ceremony, which was safeguarded in the treaty.
6. The inter-communication and commercial transactions between the two states, liquidated the prejudice among the people of Mecca spread by their government against the Muslims. The next year the Muslims visited Mecca and left the city in accordance with the terms of the treaty, although the Muslims were obviously strong enough that the Meccans who had vacated the city could not oust them by force. This created a good impression about the character of the Muslims in the hearts of the Meccan masses. As a result of this the city of Mecca fell into the lap of the Muslims without blood-shed when they attacked it after the breach of the treaty by the Meccan Government; because the warlike attitude of the Meccans did not carry the popular support.

Such was the the talent of statesmanship exhibited by the 'rophet (peace be upon him) while negotiating the treaty of Iudaibiyah.

X—WORLD WITHOUT BORDERS

An idividual or a group of individuals, who declares ıdependence from the norms of a society, is a rebel and threat ɔ the peace of the society. Similarly, the society which claims bsolute freedom and authority is a problem for the internaonal peace. In the language of Political Science the bsolute freedom of a nation is called sovereignty. Today, as rof. Toynbee remarks, sovereignty is the religion of the ıajority and this god requires a lot of sacrifice from the man-

kind. Sovereignty and international peace cannot go together, practically as well as theoretically. In *A Grammar of Politics*, Harold Laski holds, "It would be a lasting benefit to Political Science if the concept of sovereignty were surrendered".

Dilemma of the U. N. Charter

The Charter of the United Nations comprising of articles divided into 19 chapters is a self-contradictory document. Article I states the purposes of the United Nations:

> "To maintain international peace and security, to develop friendly relations among nations, to achieve international co-operations in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respects for human rights and for fundamental freedoms for all, and to be a centre for harmonizing the actions of nations?

Article II declares that the U.N. is.

> "—based on the principles of sovereign equality of all members."

The bulk of the Charter is devouted to creating and controlling of the organs like the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council, the International Court of Justice and the Secretariat.

Articles I and II are fundamental in nature and spell out the object and the policy of the Charter. These two articles are incompatible and contradictory. International peace and national sovereignties cannot co-exist

Contribution of Islam

The U.N. Charter is in the nature of a multilateraly treaty. Some of its characteristics are highly objectionable from the viewpoint of the Islamic Law of Nations.

It is a perpetual treaty whereas Islam does not allow a treaty with the non-Muslims for an unlimited period because it amount to *de jure* recognition of the un-Islamic sovereignties

other than that of God Almighty.

It attaches sanctity to the territorial sovereignty. The Islamic Law terms sovereignty as *'Uluhiyāh* (الوهیت) and asserts it to be the exclusive characteristic of God. The claim of sovereignty by any earthly entity is considered to be Association (شرک) which is the greatest sin. It is the sacred duty of every Muslim to see that the sovereignties parallel to God are eradicated, the artificial geographical lines are erased and the world without borders is established in which the sovereignty rests exclusively in God Almighty. If the earthly sovereignty is recognized, it is axiomatic that stronger sovereignties will dominate and dictate the weaker ones. Iqbal says very rightly about the League of Nations, the predecessors of the United Nations:

من ازیں بیش ندانم کہ کفن دزدے چند
بہر تقسیم قبور انجمنے ساختند

"I don't know more than this that a few coffin thieves have formed an association to distribute the graveyard amongst themselves."

Even if the nations are prepared to surrender their sovereignties, there is no universally acceptable body of principles except the Islamic Law, which may bridge the gaps of racial, linguistic, geographical and communal differences. If some individuals propose some principles to be followed, the others have rights to dispute and reject. Purgation of superfluities cannot be claimed about the ideas created by the human beings. Everybody is bound to be belonging to a particular community, socialized and educated in a particular environments, and influenced by a certain set of circumstances. As far as value orientation and enunciation of legal principles is concerned, the elemination of personal bias and prejudice is humanly impossible. The only feasible way is that God shows His kindness and guides people with a body of principles. Only the Islamic Law of Nations being revealed by God, the Creator and the Protector of all, can be

equally acceptable to everyone. The Muslim is the eagle that flies over nations. He is servant of God and sees things in the light of the Divine Laws. Before him the humanity is a single and one unity. The unity of mankind and Sovereignity (توحید) of God is his Goal. The earthly sovereignties are his prey. He ensures perpetual peace on the Earth.

Neutrality

The Islamic law divides the non-Muslim Sovereigns into two categories: those with whom there exists a treaty and those with whom there is no treaty. The Muslims are supposed to be in the state of dormant or actual war with the latter, while the terms of the treaty are to be honoured with the former. The Muslims may enter into a treaty with a power to remain neutral during the hostilities with some other power. The Prophet (peace be upon him)executed treaty with the tribe of Juhainā (جہینہ) to remain neutral between the the belligerent states of Madina and Mecca.[1]

In the absence of any treaty, the concept of neutrality is not recognized by Islam. Such a treaty, too has to be for a limited period. The Qur'ānic injunction of treaty is followed by the phrase stipulating the time factor:

إِلَّا الَّذِينَ عَاهَدتُّم مِّنَ الْمُشْرِكِينَ ثُمَّ لَمْ يَنقُصُوكُمْ شَيْئًا وَلَمْ يُظَاهِرُوا عَلَيْكُمْ أَحَدًا فَأَتِمُّوا إِلَيْهِمْ عَهْدَهُمْ إِلَىٰ مُدَّتِهِمْ ۔ (التوبہ : ۴)

"(But the treaties are) not dissolved with pagans with whom you have entered into alliance and who have not subsequently failed you in aught, nor aided anyone against you. So fulfil your engagements with them to the end of the time of their term." (Q. 9: 4)

XI—CONFLICT OF LAWS

The main topics of Conflict of Laws or Private International Law are Nationality, Personal Status and Jurisdiction

1. Shiblī: *Sīrat an-Nabī*, v. 1, p. 288.

ʼer Foreigners. The Muslim jurists usually do not discuss is branch of law separately from Public International Law. ɔn Qayyim has, however, written a complete book on this subct. The title of the book is *Ahkam Ahl al Dhimmā* (احكام اهل الذمة) ıd it is in two big volumes.

ationality

Nationality is the name of nationhood. As Islam covers e entire social and political life of the human beings, Islamic Law there is no difference between religion as ell as the nationality of a Muslim. The Islamic concept of ıtionality is based on the choice of man. It is not imposed ːe other nationalities which are determinded by some ethnolocal, geographical and linguistic accident.

The Islamic world may be divided into different princiılities for the sake of convenience in the administration and ecution of Jurisdiction.[1] Each principality may carry a ɜtinct name for the purposes of reference. However nationali- of every Muslim is Islam.

The *dhimmīs* are full subjects of Islamic State. The rights d duties of the non-Muslim subjects are determined by

(*i*) the Qur'ān and the *Sunnah.*

(*ii*) the terms of the treaty between the non-Muslims and the Islamic State.

ɨimma literally means responsibility. *Ahl al-dhimma* are the n-Muslim subjects whose socio-political status is determined the contract called *aqd al-dhimma,* the fulfilment of which is a ːdge upon the Islamic State. Nationality has been defined by ɔpenheim as :

> "The nationality of an individual is his quality of being a subject of a certain state, and therefore its citizen"[2]

such, the *dhimmīs* are the subjects of an Islamic State. The

1. Dabbūsī; *Al-Asrar,* p. 151.
2. Oppenheim, *International Law,* v. 1, p. 642.

differentiation between the Muslim and the *dhimmī* subjects pertains to three spheres:

(*a*) *Taxation*

Jizyah is a tax which is levied on the *dhimmī* subjects, The Orientalists interpret the imposition of this tax as a measure of confining the full citizenship to the Muslims alone. A. S. Tritton says:

> "Only Muslims could be full citizens"[1]

Similarly, Majid Khadduri in his article *International Law* in *Law in the Middle East*, writes:

> "These scriptuaries or *Ahl al-khitab* were allowed to live in the Islamic state unmolested on the condition that they paid the poll tax and accepted the status defined by treaties or charters issued to them by the Muslim authorities."[2]

This is a misconception which has been caused by the misinterpretation of the verse of the Qur'ān, which contains the provision of *Jizya*. The complete verse is:

"Fight against such of these who have been given the Scripture as believe not in God not the Last Day, and forbid not that which God and His Prophet have forbidden, and follow not the Religion of Truth, until they pay the *Jizyah* out of hand in acknowledgement of subjection (حتى يؤتوالجزية عن يد و هم صاغرون)." (Q. 9: 29).

The translation of two phrases *'an Yadin* (عن يد) and *hum Sāghirun* (هم صاغرون), has caused misconception. *Yad* (يد) literally means 'hand'. The same expression is used in the Qur'ān, in its plural form, with reference to the 'possessor of power' (Q. 38 : 17). Therefore *'an Yadin* (عن يد) which follows in the Qur'ānic text the paying of *Jizyah* by the People of the Book, qualifies the payment of *Jizyah* and means 'until they pay the *Jizyah* being able to afford it'. It goes to the credit of the

1. Tritton, S. A. *Islam*, p. 117.
2. *Law in the Middle East*, p. 262.

People of the Book (اهل الكتاب) and implies an exemption from *Jizyah* for those who cannot offord to pay it. The practice of the Prophet (peace be upon him) and the Righteous Caliphs confirms this interpretation.

The phrase *hum sāghirūn* (هم صاغرون) has also been confused. The word *sāghirūn* is a derivation from the verb *saghara* which means 'to submit'. This word does not connote the sense of humiliation, as understood by the Orientalists. The same word has been used in the Qur'ān with reference to the magicians of Pharoah at the moment of their submission to Moses. The act of the magicians signifies their faith, and rules out any humiliation. The word conveys only the subjection of the People of the Book to the Islamic State. Thus, the verse does not render the *dhimmīs* as second grade citizens; but, on the other hand, it emphasizes that when the People of the Book become subjects of an Islamic State they should be made to pay *Jizyah* within their means.

Jizyah is usually translated as 'poll tax' and is generally misunderstood to be a tax imposed on non-Muslims in exchange for allowing them to maintain their faith. The Arabic root of the word *Jizyah* is *Jaza* which means 'to give what is due in return for something given'. The military service is not compulsory for non-Muslims. The Islamic State is based on an ideology in which the non-Muslims do not believe. It is very fair that the persons who do not believe in an ideology should not be compelled to promote its cause. All the same, they are subjects with equal rights; thus, their life and property has to be protected and defended. For this they pay *Jizyah* which may be called the 'protection tax'. It is not exacted from the women and the minors. Thomas Arnold says;

> "The *Jizyah* was levied on the able bodied males in lieu of the military service they would have been called upon to perform had they been Muslims; and it is very noticeable that when any Christian people served in the Muslim army, they were exempted from the pay-

ment of this tax".[1]

The *Shari'ah* has not fixed any permanent rate for the collection of *Jizyah*. It has been left to the discretion of the Muslim governments keeping in view the financial capacity of the *dhimmīs*. The fact that the tax of *zakat* is not imposed on the non-Muslims, implies a fair partnership between equal citizens of Islamic State.

(*b*) *Political Rights*

The Islamic State being an ideological state, its ultimate command cannot be entrusted to the persons who do not have faith in the ideology. The non-Muslims can, however hold important jobs under the command of a Muslim.

The non-Muslim subjects have right to both voting and membership of the Parliament provided that the parliament's legislative powers are subordinated to the *shari'ah*.

Von Kremer says:

> "The non-Muslim communities enjoyed an almost complete autonomy, for the government placed in their hands the independent management of their internal affairs, and their religious leaders exercised judicial functions in cases that concerned their co-religionists only".[2]

Bait al-Midras was an important educational centre for the Jews of Madina during the lifetime of the Prophet (peace be upon him).[3]

(*c*) *Personal Laws*

The non-Muslim subjects have judicial autonomy according to their religions. In civil matters if both the parties are non-Muslim, the courts of an Islamic State take cognizance if they

1. Arnold: *The Preaching of Islam*, p. 61.
2. A. von Kremer, *Culturgeschichte des Orients Unter per Chalifen*, v. 1, p. 183.
3. Ibn Hishām: *Sīrah*, v. 1, p. 552.

agree to come to the court. If they cannot agree among themselves as to the choice of law governing the case, the court shall announce the judgment in accordance with the Islamic Law. If one of the parties is non-Muslim and the cause of action arises in the Islamic territory, the Islamic Law shall be applicable. The acts such as intoxication and marriage within prohibited degree are not considered crimes if committed by non-Muslims, provided those are lawful according to their religion.

Dr. Cardahi states:

> "Qur'ānic decisions confirm the status of inferiority of the *dhimmī*, whose murder as in the Germanic laws of the West, was more easily expiated than that of a Muslim".[1]

It is interesting that after making this statement, he does not quote anything from the Qur'ān; and takes the refuge of some references of the Mālikī Jurists ignoring completely the Hanafī Jurists. Dr. Cardahi, in fact, did not consult the basic texts of the Qur'ān and the *Sunnah* in this regard. The Qur'ān (*II*:179; *V*:45; *V*:32; *VI*:152) prescribes capital punishment for murder, without discrimination between the Muslims and the *dhimmīs*. The Prophet (peace be upon him) ordered the execution of a Muslim who had murdered a *dhimmī*.[2]

There is, however, a tradition whose interpretation gave rise to divergence of views. It says:

> "A Muslim should not be killed for (murdering) an infidel. Nor should a holder of a covenant be killed so long he holds his covenant."[3]

All rights and duties of all the subjects are equal and reciprocal. But a differentiation had to be made in the case of a belligerent sojourner. He would be apt to provoke sentiments

1. Chaucri Cardahi, *conflict of Law*, treatise in *Law in the Middle East*, p. 334
2. Shawkānī, *Nayl al-Autār*, v. 7, p. 12.
3. Marāghī, *Al-Tashrī al-Islamī*, p. 82.

of hostility among the Muslim population. If a Muslim or *dhimmī* is provoked, and in violation of the pledge for protection, kills a sojourner coming from a belligerent state, he is to be punished but not to the extent of capital punishment. The state of belligerency distinguishes the sanctity of the *musta'man's* life from that of an ordinary citizen.[1]

It cannot be said that Dr. Cardahi did not have Hanafi works before him while writing his treatise. While discussing the jurisdiction of the courts that Islamic jurisdiction is the statutory jurisdiction except in matters for which there are applicable rules in *dhimmī* religions, even if the latter conflict with the Islamic Law, he quotes the Hanafī works which say that a will made with an intention which is lawful under Islamic Law but unlawful under the testator's personal law is to be held invalid. He misunderstands the phrase *bittifāq* (بالاتفاق) used in the Hanafi books. This is a figure of speech usually employed by the Hanafi jurists to connote unanimity of the Hanafī jurists. Dr. Cardahi misunderstands from this consensus of all the Muslim jurists. Similarly Profressor A. S. Tritton while enumerating discriminations between Muslim and non-Muslim subjects writes that the water which has been used by a non-Muslim, must not be used for ablution.[1] Although, in fact the water which has been used by anyone, Muslim or *dhimmī*, must not be used for ablution. Such a way of research is far from being scholarly.

1. Kāsānī: *Bodāi* 'al-Ṣanāi' v. 7, p. 73.
1. Tritton: *Non-Muslim Subjects of The Muslim State*, J. R. A. S. (January 1942), p. 40.

12

Law of Crimes

I—INTRODUCTION

It is one of the prime objectives of Islam to get itself perpe-ıated and transmitted through a well integrated pattern of ɔcial institutions. The human nature is such that to preserve ıe integrity and solidarity of the social institutions, deterrent, ɛformative, retaliative and other kinds of social control have to e provided in this world. Shah Walī Allah has observed that 'Islam had contended itself with the reward and punishment ı the Hereafter only, and it had not provided checks and alances in this World, the social system of Islam would have ıelted away. He has added that in the absence of immediate unitive system, the deviant and delinquent behaviour gets ıternalized into the human beings and becomes their second ature.[1] In the absence of immediate anticipation of punish-ıent, the entire institutional structure stands on weak footings. 'he enforcement of the penal system has, therefore, been made ollective obligation (فرض كفايه) of the Muslim Community.

ɛlativity of Institutional Gradation

None of the institutions exists in isolation. They are

1. Shah Wali-Allah : *Hujjat Allah al-Bālighah*, v. 1, p. 451.

mutually interrelated. Some institutions are, however, mor significant and important than the others. The arrangemen of the institutions according to their significance in a society, i called the gradation or hierarchy of values. This is relativ and varies from society to society, and culture to culture.

The more significant an institution is, the more vigorousl the society reacts to the behaviour which violates the norms o that institution. As the significance varies, the intensity o reaction and quantum of punishment for the respectiv delinquency also varies.

In the Sensate cultures and societies, sense perception i the only avenue of knowledge and physical pleasure is the onl object of life. The most precious thing in such societies is th life of individuals, and the most heinous act therein is th crime against human life—murder. The background for pro viding capital punishment for the offence of sedition is politica and not social.

The Idealist cultures nourish the ideological objective which may be more valuable than life and property of th individuals. The occasions do arise therein when life and property has to be sacrificed for the safegaurd and upkeep o higher values. Islam attaches more sanctity to dignity and purity of the institution of family than to the individual life. One of the reasons is that most of the heritage of Islam has to be transmitted to the posterity and prepetuated through family. The maintenance of its dignity is highly important. It is therefore that adultery is such a heinous offence in Islam.

Fixed and Variable Elements

According to Roscoe Pound, it is essential for a good legal system to have fixed as well as variable elements.[1] Islam provides such a unique legal system which contains the permanently fixed elements of *Hadd* and variable elements of *Ta'zīr*. *Hadd,* literally, means the limit and signifies fixed

1. Roscoe Pound : *Interpretation of Legal History* p. 1.

punishments for certain offences. This is universal and the variations of time and place have no impact on this. It fixes the position and posture of the pillars of certain basic values on which the entire institutional edifice is raised.

Ta'zīr, literally, means the checking punishment and signifies the quantum of punishment for the offences for which no punishment is fixed (*Hadd*) by the *Shari'ah*, and which is determined by the discretion of the Council of Consultants (مجلس شوری) or the judges. This is variable element which responds to the changes of time and place.

Five Universals (کلیات الخمس)

Ghazzālī and other renowned jurists have enumerated five universals which are the fundamental points around which the entire penal law revolves.[1] These are : (1) Protection of Religion (دین) ; (2) Protection of sanctity of family ; (3) Protection of life ; (4) Protection of property ; (5) Protection of sense (عقل)

Escape Valves

The success of a penal system lies in the extent to which it eradicates the crime and manages at the same time that no innocent person is convicted. Such a system should be extremely strict to the criminals. It should also provide sufficient valves for an innocent person to escape. Prof. Jurgen Baumann is of the view that a balanced arrangement of highly deterrent action against crime and Escape Valves is the *sine qua non* of a good system of criminal law.[2]

Escape Valves in the cases of *Hadd* are benefit of doubt (شبہ), non-availability of the prescribed quantum of evidence (نصاب شہادت) and the mode of execution. For instance, if any one of the four eye-witnesses against the person accused of

1. Al-Ghazzāli : *Al-Mustasfā* v. 2, p. 66.
2. Baumann, Jurgen 'Capital Punishment within the System of Legal Reactions of State Authority', p. 2.

adultery, refuses to stone him, lapidation (رجم) cannot be executed. In *Qiṣāṣ* (قصاص) one of the escape valves is regarding composition of the offences. In theft (سرقه) the accused person may return the stolen property to the owner and compound the offence, before the case comes to the court and get the amputation remitted.

The following remarks about the merits of the Islamic Law of crimes, are worth noting :

> "As a system the Mohammadan Criminal Law is mild. The law seems to have been framed with more care to provide for the escape of the criminals than to found conviction on sufficient evidence and to secure the adequate punishment of the offender."[1]

Inspite of the escape valves, the deterrent effect of the punishment does not get diminished. The criminal has the idea in his mind that these valves may not necessarily operate in his case.

The Islamic Criminal Law prevailed in the sub-continent in an unadulterated form upto 1772. Being endowed with the characteristic of an excellent legal system it produced wonderful results.

Warren Hastings has observed,

> "Let the justice of this distinction of punishment be examined by its effects. There are not many instances of robbery in India where these principles prevail, scarce any murder. A traveller may pass through the whole province unarmed and sleep in security in the open plain. He will have no enemies to dread but the wild beasts."[2]

It is significant that such a remarkable achievement was made by the system in spite of the political instability and inefficient authority of the Moghul Rulers.

II—THEORIES OF CRIMINALITY

It is the theory of criminality which makes the mind of the

1. 'Parliamentary Papers' (1831-32), Vol. XII, p. 696.
2. Jones, Monckton *Warren Hastings in Bengal* p. 157.

:ople to see the phenomenon of crime from a particular angle. he people believing in different theories are bound to have ifferent views about certain crimes, and the treatment of the :iminals.

Western Theories

Lombrasso is known to be the first Western criminologist ho tried to propound a theory of criminality. He founded iological School of Criminology. According to him the :iminals are the *etavists*. By this he meant that the minds of ıe criminals were not fully developed to the human level and ill retained the characteristics of animals. He arrived at this :sult after conducting a statistical research on the skulls of the :iminals in Italy. He found that the structure of the skulls of ıe criminals was biologically different from that of the law biding citizens.

The later Western scholars vehemently opposed the iological Theory. They asserted that the delinquents and the ɔnformers do not differ in their biological potentials. Their :searches indicate that the factors which lead to crime are sychological and sociological.

Freud is the greatest exponent of the Psychological Theory. [e says that the human nature is basically bad. Man's basic ature or 'libido' is blind. He calls it 'id'. The most of the art is sub-conscious. The society by means of its value system nd superorganic tries to tame and impose limitations on its d'. To this part of mind he gives the name of 'super-ego'.)uring the struggle between 'id' and 'super-ego,' 'ego' acts as a :nsor and regulates and reconciles between the desires of the d' (cathexes) and the checking forces (anti-cathexes). By this ypothetical division of human mind into three compartments 'reud explains the mode of human behaviour.

The strength of 'ego' varies from individual to individual. 'he moment the frustrated force of 'id' outweighs the :ressure of 'super-ego', the sensor of 'ego' is broken and the man

violates the social norms. Everybody, according to this theor is potentially a criminal. The difference between a law-abidi citizen and a criminal is that the latter's 'ego' is comparative weaker and a little pressure of the 'id' can pierce through i Accordingly, the most respectable citizen may break the la provided he is satisfied that he will not be caught. The 'eg of delinquents is weak because they attach little importance the social control of the 'super-ego', while the 'ego' of the co formers is strong for their being very sensitive towards t expectations of the 'super-ego'.

Sutherland is the figurehead of the Sociological School. H maintains that the biological potentials of the human beings a neither good nor bad. The criminal behaviour is learnt durin the process of socialization in the society. The society provid both the ways of doing things; the approved and the disappro ed. The criminal resorts to the disapproved ways if those a more favourable to him under his circumstances.

Islamic Theories

The main postulates of the Islamic theory of criminality a as follows:

(*i*) The human nature is basically good.

لَقَدْ خَلَقْنَا الْإِنْسَانَ فِيْ أَحْسَنِ تَقْوِيْمٍ ۔ (التين : ٤)

"We have indeed created man in the best of moulds." (Q. 95 : 4)

(*ii*) The human beings are potentially capable of bein driven to the right as well as to the wrong paths.

فَأَلْهَمَهَا فُجُوْرَهَا وَ تَقْوٰىهَا ۔ (الشمس : ٨)

"And enlightened (the soul) as to its wrong and to the right." (Q. 91 : 8)

(*iii*) The nature has gifted the human beings with th freedom of will. The criminal acts are earned by th

people, and everybody is personally liable for his wrong doings.

مَآ اَصَابَكُمْ مِّنْ مُّصِيْبَةٍ فَبِمَا كَسَبَتْ اَيْدِيْكُمْ۔ (الشوریٰ: ۳۰)

"Whatever misfortune happened to you is because of the things that your hands have wrought."
(Q. 42 : 30)

ظَهَرَ الْفَسَادُ فِي الْبَرِّ وَالْبَحْرِ بِمَا كَسَبَتْ اَيْدِي النَّاسِ۔ (الروم: ۴۱)

"Mischief has appeared on land and sea because of that the hands of men have earned." (Q. 30 : 41)

لَهَا مَا كَسَبَتْ وَعَلَيْهَا مَا اكْتَسَبَتْ۔ (البقرہ: ۲۸۶)

"Everybody gets the good that it earns, and it suffers the ill that it earns." (Q. 2 : 286)

To express the nature of human actions, the Qur'ān has ed the word *Kasb* (کسب). Following this terminology, the lanced and the popular view of Muslim jurists is that a man neither the creator (خالق) of his deeds nor his actions are e-determined. The reality is in between these two positions. e man earns his behaviour by employing his free-will within limited choice of alternatives at his disposal. In Islam, refore, the phenomenon of crime is explained by the theory *Kasb* which is neither creation (قدر) nor pre-determination).

(*iv*) Regarding the violation of the fundamental principles of Islam like Unity (توحید), the excuse that the guidance has not reached, is not acceptable. Their truth is so evident that it springs from the very nature of the human beings. The Qur'ānic verse speaks in unqualified language on this subject.

اِنَّ اللّٰهَ لَا يَغْفِرُ اَنْ يُّشْرَكَ بِهٖ وَيَغْفِرُ مَا دُوْنَ ذٰلِكَ لِمَنْ يَّشَآءُ۔ (النساء: ۴۸)

"Allah forgives not (the sin of) associating other gods

with Him, but He forgives whom He pleases other sins than this."
(Q. 4 : 64)

As far as the provisions which are not so fundamental in nature, their violation is held bad, but the violators are not punished for the reason that the guidance has not reached them

وَمَا كُنَّا مُعَذِّبِينَ حَتَّىٰ نَبْعَثَ رَسُولًا ۔ (الاسراء : ١٥)

"Nor would We visit with Our Wrath until We had raised an Apostle."
(Q. 17 : 51)

Comparison

The Western theories almost eliminate the role of deliberation and free-will on the part of the criminal. They lay all the emphasis on either the inborn characteristics of human beings or the role of society.

The Biological School says that a person commits crime because of the inherent defect in his mind. The Psychological School holds that crime is instinctive. The Sociological School maintains that the individuals are just like an unmanned boat which is at the mercy of the flow of the waves. These theories cannot explain the role of the individuals who pick up courage to differ with the society and introduce significant reforms.

The Western theories have been propounded as a result of research and reasoning. The Islamic theory comes to us directly through the Divine Guidance. The Creator of man has by all means the best and the exact knowledge about the nature of human behaviour. The endeavours of the Western scholars can at the most achieve the status of the probable knowledge. The probable knowledge has to be rejected if it comes into conflict with the definite provisions of the Divine Revelation. This principle has been discussed in the part of Jurisprudence.

The people of the Western society who reflect on the phenomenon of crime, are in one way or the other under the

pact of the Western theories of Criminality. They presuppose e helplessness of the criminal. They are always biased in vour of the criminal. For this reason, they are usually allergic the severe punishments. Their attention is focussed on the iminal rather than the crime. The people who owe all of eir loyalty to some ideology which is spelled out in the form of w, cannot tolerate the violation of its provisions. Their main tention is on the crime instead of the criminal, and they want make sure that it is no more repeated. To achieve this end ey patronize severe punishments. They proceed, moreover, the belief that the human beings are given the freedom of ll which they exercise during the commission of crime. How-er, they recognise the mitigating circumstances in which the edom of will could not be exercised.

III—DEFINITION AND CLASSIFICATION

Māwardī defines crime as unlawful acts (محظورات) for iich punishments have been provided by God by way of ed (حد) or discretionary (تعزير) punishments.[1] The unlawful t may be to do something which has been prohibited to be ne (منهى عنه) or omit to do something which has been ordered be done (مامور به). Crime is, therefore, act or omission in iich some provision of Divine Law (نص شرعى) or the law made ereunder, is violated and punishment (عقوبة) has been provided that.

In Islam crime is not committed unless some Divinely re-aled provision is violated, or laws made under such provisions e broken. But in the secular states, crime may be committed violating the laws enacted by the worldly authorities. The ier distinguishing feature is that in the Islamic State, there is divergence between the law and the morality. Every crime a sin, as well.

The Muslim jurists use the word *Jarimah* (الجريمة) or *Jinayah* الجنا) for crime. Although most of the jurists reserve the word

1 Māwardī: *Ahkāni us Sultāniyā*, p. 192.

Jināyah for the offences against the person, like homicide, causing injury, etc.[1]

Classification According to Punishments

The crimes may be classified into three kinds according to the quantum of punishment.

(*a*) *Crimes of Fixed Punishment* (جرائم الحدود).

These are the crimes for which the kind and the quantum of punishment have been prescribed by God in the exercise of His exclusive Right. Such punishments are called the fixed punishments for the reason that these can neither be increased nor be decreased by anybody.[1]

The crimes of fixed punishment are seven in number:

(*i*) Adultery and Fornication (الزنا).

(*ii*) False Accusation (القذف) of unchastity.

(*iii*) Drinking of Wine (الشرب).

(*iv*) Theft (السرقه).

The person who commits theft, shatters mutual confidence of the entire society. By cutting his hand, a deterrent stigma is symbolised.

(*v*) Robbery (الحرابة).

(*vi*) Apostasy (الردة).

(*vii*) Sedition (البغی).

(*b*) *Crimes of Retaliation and Blood money* (جرائم القصاص والديه).

For some crimes the punishment is provided by way of retaliation or blood money. These crimes are looked at mainly from the angle of the rights of the person against whom the offence is committed. They are five in number:

(*i*) Homicide amounting to murder (القتل العمد).

(*ii*) Homicide amounting to *quasi*-murder (القتل شبه العمد).

(*iii*) Homicide as a result of negligence (القتل الخطا).

(*iv*) Intentionally causing injury to or striking at the body

1. Ibn Nujaim: *Bahrur Rāiq*, v. 8 p. 286.
2. Ibn al-Humām *Fath al-Qadir*. v. 4, p. 112; Kāsānī *Badāi' as-Sanāi'*, v 7, p 33.

of the person without causing death (الجناية على ما دون النفس عمدا).

(*v*) Negligently causing injury to (الجرح) or striking at (الضرب) the body of the person without causing death (الجناية على ما دون النفس خطاء).

(*c*) *Crimes of Discretionary Punishment* (جرائم التعازير)

Ta'zīr (تعزير) literally means punishment. The crimes which do not fall under the first two categories are the crimes of discretionary punishment. The kind and the quantum of punishment in these offences is left at the discretion of the judge, who awards punishment according to the circumstances of each case. These offences are innumerable. However, they are of two kinds.

(*i*) The acts or the omissions in which some Divine Provisions (نصوص شرعيه) are violated. For instance, the practice of usury (الربا), misappropriation of pledge (خيانة الامانة), bribery (الرشوة), abuses (السب), etc.

(*ii*) The violation of the rules, regulations and orders, of the government (اولو الامر) acting as sub-legislative authority. Such rules and regulations cannot be arbitrary. They must be promulgated in the larger interests of the society. Not only that they should not contravene any Divine Provisions but also they should be furthering and executing some Divine Injunction. The legislative powers of the government are limited to this extent.[1]

Classification According to Intention (قصد الجانى)

If we think in terms of the intention of the offender, the offences are divisible into two kinds:

(*a*) *Intenational Offences* (الجرائم المقصودة):

In these offences the offender commits crime knowing that he is committing illegal act. Intention is particulary relevant

1. 'Abdul Qādir 'Audah: *Al-Tashri'al-Jināi*, v. 1, p. 81.

in the offences of homicide. If the offender intends the illegal act as well as the result of his act, it is homicide amounting to murder (القتل العمد). In case the offender intended only the act and not the result of the act, it is homicide not amounting to murder (القتل شبه العمد).

(*b*) *Un-Intentional Offences* (الجرائم غير مقصودة)

In these offences, the offender does not intend to commit an illegal act. But the illegal act happens to have been committed by him negligently. The negligence (الخطا) takes place in two ways:

(*i*) The offender intends the act but does not know that it will amount to an illegality. For instance, during the war, a soldier shoots at one of his colleagues under the impression of an enemy.

(*ii*) The offender does not even intend the act. Killing of a person by rash and negligent driving or by shooting at a bird in the bush, are the examples of this kind.

Classification According to Peculiarity (طبيعتها الخاصه)

The crimes are divided into two kinds according to their peculiarity of being against the public or individuals.

(*a*) *Crimes against Public* (حقوق الله)

The crimes which are offence against public, are punished to safeguard the well being of the society. Such offence may be committed against individuals as well as against the public. They are called offence against public because of their preponderantly being injurious to the society at large. The jurists term these offences as Rights of God (حقوق الله). Wisdom underlying the use of this term is that these rights are meant for the protection of state and the execution of punishment for their infringement is the exclusive right of state. They cannot be pardoned, diminished or extinguished by the individual. The crimes of theft and giving false evidence are the instance of this kind.

Crimes against Individuals (حقوق العباد):

The crimes which are offence against individuals, predominantly affect the individuals. They are, however, injurious to the public life, as well. They are termed as Rights of individuals (حقوق العباد) because the individuals can give up their rights and compound the punishment. The crimes of retaliation (قصاص) and Blood-money (دیت) are the instances of this kind.

Pardoning Power of State

The head of state has no pardoning power in the following kinds of crimes:

(*i*) *Crimes of fixed punishment* (جرائم الحدود).

(*ii*) *Crimes of retaliation* (قصاص).

(*iii*) *Crimes of blood-money* (دیت).

The rights of punishment in the above-mentioned cases rest in God Almighty or the individuals. The head of the state has no jurisdiction to suspend or obrogate these rights. Implementation of these punishments is obligatory on the state.

In the cases of discretionary punishments (جرائم التعزیر), the state has got pardoning powers. In these crimes, the right of punishment has been delegated, by the *Shari'ah* to the state. The state has got discretion to alter the quantum of punishment to the minimum extent of mere admonition (توبیخ).[1]

The right of discretion cannot be exercised arbitrarily. It should promote the public good and hinder the evil. The crime can be pardoned after it is committed and not before that; similarly the punishment can be pardoned after it is awarded. The pardoning of an offence before it is committed amounts to legalising the offence, which is prohibited by the *Shari'ah*. No head of the state has jurisdiction to suspend the provisions of the *Shari'ah*.

1. 'Abdul Qādir 'Audah: *Al-Tashri' al-Jinā'i*, v. 1, p. 247.

IV—STRUCTURE OF CRIME

There are three constituent elements of crime:

1. Legal Element (الركن الشرعي):

There should be a juristic argument (نص شرعي) from *Shari'ah* which prohibits the commission of crime and provi punishment for that. Merely the existence of a juri argument is not sufficient to incriminate a person and pu him. The juristic argument or legal provision must have b enforced (نافذ) on the offender at the time of the commissio offence, and at the place where the offence is committ This gives rise to two significant principles of the crimiñal la

Retrospective Punishment (العقوبة الرجعية)

Punishment for committing an offence cannot be retrospective effect. The legal provision which is viol should be enforced before a person is held criminally liable that. The principle has been enunciated in the Qur'ān:

وَمَا كُنَّا مُعَذِّبِينَ حَتَّىٰ نَبْعَثَ رَسُولًا ـ (الاسراء : ١٥)

"Nor would We visit with Our Wrath until We had raised the Apostle." (Q. 17: 15)

According to this verse the Practice of God is not to pu the wrong doers unless the law is declared and enforced thro the prophets. In this verse the word 'raising' of prophet (has been used which is quite distinguishable from the v 'sending' of prophet (ارسال). The latter signifies only declaration of law, while the former emphasizes the enforcer of law as well. Another verse lays down this principle :

وَأَنْ تَجْمَعُوا بَيْنَ الْأُخْتَيْنِ إِلَّا مَا قَدْ سَلَفَ ـ (النساء : ٢٣)

"And two sisters in wedlock at one and the same time, *except for what is past.*" (Q.4 : 23)

'Abdul Qadir 'Audah: *Al-Tashri'al-Jinā'i*, v. 1, p. 112.

me and Sin

The distinction between crime and sin is also created by fact of the enforcement of law. The violation of a il provision within the *de facto* jurisdiction of the mic State (دارالاسلام), is crime as well as sin. The territory ere the *de facto* jurisdiction of the Islamic State has not yet nded (دارالکفر), the offence committed therein is not cogniz- e by the Muslim Courts. Such an offence is merely a sin. reason is that it has been committed at a place where the mic Law has not yet been enforced.

mparison

Islam enunciated and applied the principle, 'no crime and punishment without the legal provision (لاجریمۃ و لا عقوبۃ بلا) in the seventh century. It was, on the other hand, lied in the West in the end of the eighteenth century. It introduced, for the first time, into the French Law as one he contributions of the French Revolution of 1789.

Material Element (الرکن المادی)

This is doing of an action which is prohibited by law. This y be positive (act) or negative (omission). The punishment vided by law is attracted only if the offence is completed.

If the offence remains incomplete it is called attempt الشر). Fixed punishment (حد) or retaliation (قصاص) is not cuted for attempting an offence. The discretionary punish- nt (تعزیر) and blood money (دیت) are imposed on the person o is guilty of attempt to commit a crime.

The crime may be committed singly or jointly (الاشتراک). e offence is committed jointly when two or more persons co- rate with each other for the commission of that offence. is cooperation may be of two kinds. If the other person ctically takes part in the performance of the material ment, it is co-operation by action (الاشتراک المباشر). If other person simply instigates the commission of offence, s cooperation by abetment (الاشتراک بالتسبب). The one who

co-operates by action is equally liable. The abetter is subjecte to the discretionary punishment (تعزير) whether he abeted for th crime of fixed punishment, retaliation (قصاص) or discretionar punishment.

3. Penalising Element (الركن الادبى)

This element relates to the discussion of the basis of crimin responsibility (مسئولية الجنائيه) and the circumstances whic create general exceptions (ارتفاع المسئولية الجنائيه) to that

In the *Shari'ah* criminal responsibility rests on three founc ations :

(*a*) a person commits a prohibited action,
(*b*) the person exercises his free will,
(*c*) the person has the capacity to discriminate betwee the right and wrong,

The Western Society adopted the same bases of crimin responsibility after the French Revolution.

In the absence of the first basis, there is no crimin responsibility (ارتفاع المسئولية) ; and in the absence of the secon and the third bases, criminal responsibility is there but there no punishment (ارتفاع العقوبة).

The exercise of rights and the performance of obligatio are the circumstances which render the first basis absen These may be :

(*i*) Right of defence (الدفاع الشرعى).
(*ii*) Right of punishment (تاديب) which, for instance, fath and teacher have got.
(*iii*) Medical treatment (تطبيب)
(*iv*) Playing of game (العاب)
(*v*) Implementation of law (اهدار), as the killing of enen persons in the war, execution of punishments, etc.
(*vi*) Obeying lawful commands of the authorities (وق الحكام).

The following circumstances cause absence of the second and the third bases,

(*i*) Compulsion (الاكراه).

(*ii*) Intoxication (السكر). This is relevant only if a person is not intoxicated deliberately.

(*iii*) Lunacy (الجنون).

(*iv*) Minority (صغر السن).

(*v*) Trifles (الترفيل).

13

Law of Torts

I—INTRODUCTION

A tort may be defined as a civil wrong independent of con-
ct for which the appropriate remedy is an action for damages.
parallel concept in the Islamic Jurisprudence is *Jinayah*
جنایہ). The principles of tort are part and parcel of
ry civilized society. The parallel term for damages is
mān (ضمان) in Islamic Jurisprudence and *dānd* (ڈانڈ) in
ıdi.

Common Law is the main source of law in the British
ral System. This is supposed to be so comprehensive that
British jurist proceeds on the assumption that the Com-
n Law governs every exigency of life. In case it is realized
the British Parliament that the reasons underlying some
visions of the Common Law are no more acceptable to
prevalent ideas, the Statutory Law is enacted. The statute
tinues enjoying its force until its underlying wisdom is
arded and it is repealed. Where it is found that neither
Common Law nor the Statutory Law helps to solve
problem, support is sought from some abstract theory of
losophy. This is termed by the British jurists as Equity
معیار), Justice and Good Conscience. The sources of law in

the British Legal System are, therefore, three in number: Com mon Law, Statutes and Equity. As the British parliamen is sovereign, the statutes are supreme and override othe sources.

The British Rule imposed its sovereignty in India. Th statutory law was the first and primary source of law. I case no statute was applicable, the personal laws would b enforced. If situation was neither governed by some statut nor by the personal laws, 'Equity, Justice and Good Cor science' was attracted. The British Courts in India imported th Common Law of England in the garb of Law of Torts throug the channel of 'Equity, Justice and Good Conscience'. Th same state of affiairs continued after the birth of Pakistan. Th principle of the sovereignty of the parliament could not preva and the statutory law, instead of the *Shari'ah*, could not rema the supreme law of the Land. Similarly, 'Equity, Justice an Good conscience' of the people of England cannot be the 'Equit Justice and Good conscience' of the people of Pakistan. Nothi can be more wrong than imposing the British customs (princip of Torts) over the people of Pakistan who profess faith in t Islamic principles of 'Equity, Justice and Good Conscience.'

The purpose of the Law of Torts is to make a pers responsible while exercising his rights. He should act in lawful manner and should not cause injury to the other p sons' rights. The holy Prophet (peace be upon him) says:

> "A Muslim should not cause injury to the rights of the others by his words or actions".[1]

'Right', in its broadest sense, is a benefit which accr to an individual under the law. It may impose a correspon ing duty on the others or not. The rights which do cause corresponding duties, are also called liberties. Sir Jo Salmond has described seven kinds of a right. But all th are concerned with person, property and reputation.

1. Bukhārī: *Sahih*, v. 1, p. 14.

holy Prophet (peace he upon him) declared:

> "Your blood, your property and your reputation are respectable this day in this month and in this town."[1]

When these rights are injured, the injured person may have two kinds of remedy: criminal and civil. The object of the criminal remedy is to punish the wrong doer whereas in the civil remedy the right of a person is proved and established, and the wrong is checked or compensated. The remedy wherein the wrong is compensated by way of *damages* (ضمان) is called *Tort* (جنایت).

All the kinds of Tort have been discussed by the Muslim Jurists. The definitions and the remedies of various torts have not been evolved by the minds of the Muslim Jurists. They were all contained in the Qur'ān and the *Sunnah*. The jurists have discovered therefrom and discussed in their books. Torts against persons and human bodies are discussed under the chapters of *Kitāb al Diyah* and *kitab al-Jināyah*. Torts against property are discussed in *kitāb al Ghaṣb* (کتاب الغصب). Some proplems may be found in *Kitāb al-Laqtā*. The author of *Al-Hidaya* has discussed the injuries which may be caused to a traveller, under *Kitab al-Diyah*. The discussion about the animals and conveyance is found in *Kitāb al-Jinayah*. Nawawī and other Shāfi'ī jurists discuss these matters in *Kitāb al-Ṣulh* (کتاب الصلح). The matters concerned with Fraud and Negligence may be found in *Kitāb al-Iqrah* (کتاب الاکراہ) *Kitāb al-Iqrār* (کتاب الاقرار), *Kitāb al-Ijārah* (کتاب الاجارہ), *Kitāb al-'Āriyah* (کتاب العاریة) and *Kitāb al-Rihn* (کتاب الرہن).

II—ELEMENTS OF TORT

Malice and Motive

Under the British Law of Torts, malice (کینہ) is generally not relevant. Malice means ill-will against a person ; in its juristic sense. It means a wrongful act done intentionally with-

1 *Khuṭbā Hajjat al-wadā'*

out just excuse. The word 'wrongful' imports the infringement of some legal right. Malice is of two kinds: express (صریح) malice and implied (معنوی) malice. The former is established in fact, for doing an act with ill-will towards an individual. The latter derives its character from the circumstance that the act done constitutes a violation of the law.

A malicious motive *per se* does not amount to an *injuria* or legal wrong. Where an individual has a right to do an act, it is not possible to make his exercise of such right actionable by proving that his motive was malicious.[1] Similarly, good intention is no justification for torts against property.

The Islamic Law, also, deals with the manifest (ظاهر) circumstances and leaves the hidden intention (نیت) to God.[2] Marghīnānī has started the chapter of *Ghaṣb* of his book *Al-Hidaya* with the following words :

> "If the usurpation (غصب) is with the knowledge that the usurped property belongs to somebody else, it is sin and also the usurper is liable for the damages. The latter is the right of man and in it the intention (قصد) of the usurper (غاصب) is irrelevant. If the act of usurpation was done unintentionally, the liability of damages will accrue but it will not be a sin."[3]

Damage and Damages

'Damage' and 'damages' are not equivalent terms. *Damages* (ضمان) is the compensation which the court awards for the injury; and the *damage* is the legal injury which is supposed to be compensated.

In the English Law of Torts, the significance of legal damage is illustrated by two maxims, namely, *injuria sine damno* and *damnum sine injuria*. *Damnum* means damage in the substantial sence, *injuria* means a tortious act or an action contrary

1. *The Mayor of Bradford* vs. *Prickles* 1895 A.C. 587.
2. Shāfi'ī: *Kitāb al-Umm*, v. 6, p. 199.
3. Marghīnānī : *Al-Hidāyā*, v. 3, p. 356.

to law, and *sine* means without. In case of *injuria sine damno*, infringement of a legal private right without any actual damage is actionable.[1] In case of *damnum sine injuria*, actual and substantial loss without infringemrnt of any legal right is not actionable.

Unlike the English Law, the Islamic Law does not contemplate damages or monetary compensation in case of every wrongful act. The British Law reflects commercial mentality of its legislators. In Islamic Law damages can be awarded only if the wrongful act causes actual damage. However, a wrongful act without actual damage is punishable with *ta'zīr*. Shams al-Ā'immā Sarakhsī writes:

> "Wrongful act against property is punishable with *ta'zīr* and imprisonment. The remedy of damages has been prescribed for the purpose of compensation of the loss. The quantum of compensation should be according to the equivalent value of the damaged thing. The balance of compensation should not exceed the actual damage caused by the wrongful act.
>
> No wrong should be done to the wrongdoer, but justice should be done to him. His right to property is also respectable. If the wrong doer is made more liable than the damage caused by his act, it will be a transgression which would be attributed to the *Shari'ah*, and no transgression can be attributed to the *Shari'ah*. The wrongful act which has not resulted into actual loss, is not actionable in court. This is only in this world. Such wrong-doer is answerable in the Hereafter."[2]

It is interesting that in the Hindu Law also, damages can be awarded only for that wrongful act which has caused actual damage.[3]

III.—NEGLIGENCE

The wrongful acts are either committed intentionally or

1. *Ashbee* vs. *White*, (1703) 2 Ld. Raym. p. 938.
2. Sarakhsī : *Al-Mabsūt*, v. 11, p. 80.
3. P.N. Sen : *Hindū Jurisprudence*, p. 239.

with negligence. In the Islamic Jurisprudence the terms used for intention and negligence are *Qaṣd* (قصد) and *khaṭā* (خطا), respectivity; although these may not be their literal translation.

The Islamic Law and the British Law are unanimous that negligence amounts to tort if that much care (تثبت و احتیاط) is not observed by a person in doing an act which is obligatory (واجب) on him under the law; and, as a result, the damage is caused which he never intended (بلاقصد ـ بلاتعمد), Bahr al-'Ulūm has enumerated the two ingredients:

1. لانه حدث من عدم تثبت الذی هو من تقصیر

"That the damage is caused due to the non-observance of care"

2. فیه جنایة لعدم التثبت والاحتیاط الواجبتین

(فواتح الرحموت ص ۸۲)

"It is tort due to the avoidance of the obligatory care."[1]

Abū Hanifā says that the condition of care (شرط سلامتی) is legally implied in all the permitted (مباح) acts.[2]

Law does not expect the extreme standard of care from the citizens. Only that much care is required which is observed by a person of ordinary prudence. It depends on the facts and circumstances of each case. The British Law has not provided any standard for normal care; whereas in the Islamic Law the possibility (امکان) to avoid the consequences, is the standard of care.[3]

If it was not possible for the person to avoid the consequences, and the damage was caused due to the act of God (من جانب الله), he is not liable.[4] The damage may be the

1. Bahr al-'Ulūm : *Fawātih al-Rahamūt*, p. 82.
2. Kāsānī : *Badāi'*, v. 7, p. 277.
3. Sarakhsī : *Al-Mabsūt* ; v. 26, p. 189.
4. *Al-Mudawwanā*, v. 4. p. 361.

rect result of the act (اتلاف بالمباشرة) or may be the indirect sult of the act (اتلاف بالتسبب). The cause of indirect result ust be, however, probable and not remote,[1] If the damage done due to the incompetence of a person who belongs to e profession which reguires certain skill, he is liable.[2]

IV—VICARIOUS LIABILITY

Vicarious liability (نیابتی ذمہ داری) means that a person her than the one who committed the wrongful act, is held sponsible. In the British Law if a servant commits tort ıring the performance of his duties, his master is liable. he British Law presumes that if a servant becomes negligent commits tort, either he had permission from his master the master was negligent in the appointment of such an esponsible servant.[3]

A servant is different from an independent contractor (خود مختار معاہ). An independent contractor is not subject to e control and supervision of the master. Generally speaking, e master is not liable for the torts of the independent contractor.

In the Islamic Law there are two kinds of servant (اجیر): *īr al-mushtarak* (اجیر مشترک) and *ajīr al-khās* (اجیر خاص).[4] he former is entitled to remuneration (واجب الادا معاوضہ) due his tendered service, and the latter submits his person to e master for a particular period whether during that period renders some service or not.[5] The parallel terms for independent contractor and servant, in the Islamic Law, are *īr al-Mushtarak* and *ajīr al-khās*.

The general principle of Islamic Law is:

فعل مامور المستاجر کفعل المستاجر بنفسه

1. Kāsānī : *Al-Badāi'*; v. 7, p. 272.
2. Ibn Rushd : *Badāyat al-Mujtahid*, v. 2, p. 49.
3. Salmond : *Law of Torts*, p. 105.
4. Marghīnānī : *Al-Hidāyā*, v. 2, p. 292.
5. Abū Mohammad Ghānim : *Majma' al-Ḍhamānāt*, p. 27.

"The act of the servant is the act of the master."[1]

But this principle is subject to one condition. If t servant (اجیر) has the knowledge that he is doing an illeg act on the instructions of his master (مستاجر), the serva himself will be liable. But if the servant does not know th the instructions are for an illegal act, the master will liable.[2]

The permission of the master may be express as well implied. Abū al-Hasan Karkhī has illustrated this princi by a maxism ;

ان للحالة من الدلالة كما للمقالة

(قواعد كليه)

"The implied permission is just like the express permission."

V—CLASSIFICATION OF TORTS

Ibn Rushd has classified Tort as follows:[3]

1. Torts against person and body. For instance, hu etc.
2. Torts against reputation (ناموس). For instance, fal accusation of unchastity (قذف), defamation (حیثیت عرفی).
3. Torts against property. For instance, usurpati (غصب), trespass (مداخلت بے جا) conversion (سرقت بے جا) etc.

1. Sarakhsī : *Al-Mabsūt*, v. 27, p. 3.
2. Mahmūd Āfandī : *Al-Tahrīr fī ḍhamān al-Āmir wal Māmūr wal A* p. 11.
3. Ibn Rushd : *Bidāyat al-Mujtahid*, v. 2, p. 33

14

Law of Contract

I—INTRODUCTION

The Romans and, therefore, the Anglo-American Legal systems have got a General Theory of contracts and obligations. The approach, as a whole, is philosophic. The rules governing the concrete cases and the special contracts are deduced from the General Theory of contracts. The approach of the Islamic System in Scientific. From the concrete cases of Special Contracts, certain rules of general import are induced which are called the Islamic Law of Contract.

A contract is bilateral act which is entered into with the intention of creating legal consequences. Its faithful execution is a duty enumerated, by the Qur'ān:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ ـ (المائدة : ١)

"O the believers ! perform your contracts." (Q. 5 : 1)

Contract has been defined by Article 103 of the 'Majella' as,

> "the obligation and engagement of two contracting parties with reference to a particular matter. It expresses combination of offer and acceptance."

A valid contract should fulfil the following conditions:

(*i*) consent of the parties.

(*ii*) legal capacity of the parties.
(*iii*) consideration (واجب الادا معاوضه).
(*iv*) subject-matter (محل العقد).
(*v*) in some cases, a special form.

Agreement and not form is essence of a contract. Aricle 3 of the 'Majella' says :

> "In contracts effect is given to intention and meaning and not to words and phrases."

Acceptance should correspond to the offer. It should not be tendered after the offer has expired. If acceptance and offer are communicated by post, contract is made at the place and time of acceptance.

Silence does not amount to acceptance except when a person is expected to make a declaration. Ibn Nujaim says:

> "No statement is imputed to a man who keeps silent, but silence is tantamount to a declaration where declaration is necessary."[1]

Misrepresentation, fraud, coercion and error are the impediments to consent. In the presence of an impediment, consent is not free.

The object of contract must be lawful. The presumption is that every object of contract is lawful unless expressly prohibited by a provision of law.[2]

II—TRANSFER OF OBLIGATIONS

In the Roman Law the obligation of debt was strictly personal. The Romans did not recognize the legality of the transfer of debt. In Islamic Law it is permitted. In the terminology of Islamic Law the document by means of which debt is transferred (Negotiable Instrument), is called 'hawala' (حواله).

The Modern Commercial Law, is mostly based on the concept of transferability of debt. This concept was carried

1. Ibn Nujam, *Al-Ashbah wal-Nazāir*, p 61.
2. Ibn Qayyim, *I'lām al-Muwaqqi'īn*, v. 1, p. 299.

o Europe by the Muslims through Spain. In the French w, Negotiable Instrument is called *avel*, which is derived m the Arabic 'hawala'. This is evidence of the fact of rowing from the Muslims.

III.—JURISTIC PERSON (الشخصية المعنوية)

The Orientalist Joseph Schacht has said:

"Islamic Law does not recognize juristic persons."[1]

This statement seems to have been made to allege iciency in the Islamic Law, which in fact is not there. The ıslim jurists have been writing on the concept of 'juristic son' and have been asserting that the Islamic Law has ays recognized it. Abdul Qādir 'Audah says:

و قد عرفت الشريعة الاسلامية من يوم وجودها الشخصيات المعنويه فاعتبر الفقهاء بيت المال جهة و الوقف جهة اى: شخصاً معنوياً وكذالك اعتبر المدارس و الملاجى و المستشفيات و غيرها و جعلت هذه الجهات اؤ الشخصيات المعنويه اهلاً لملک الحقوق و التصرف فيها -

(التشريع الجنائى الاسلامى ج ١ ص ٢٩٢)

"The Islamic Law has, since its dawn, recognized the existence of juristic persons. The jurists have discussed the state treasury and *waqf* as juristic persons. Similarly, they have considered the schools, orphanages, hospitals, etc. as the juristic persons and competent to hold and exercise the rights."[2]

Alī Khafif in *Kitābal Haq wal-Dhimmā* ("كتاب الحق و الذمه") and stafā Zarqā in *Al-Madkhal al Fiqhi al-'Aam* (المدخل الفقهى العام) e vehemently asserted that the concept of juristic person. (الشخصيه الحكميه - الشخصيه المعـ) exists in the Islamic Law in most developed from. Muṣtafā Zarqā says :

و اذا رجعنا الى النصوص و المصادر الاصلية فى الشريعة وجدنا فيها احكاما تشعر با نها انما بنيت شرعاً على فكرة

1. Joseph Schacht, *An Introduction to Islamic Law*, p. 125.
2. 'Abd al-Qdir 'Audah: *Al-Tashri' al Jinā'i*, v. 1, p. 292.

الشخصية الاعتبارية بنظر اجالى يستلزمه ايجاب الحكم و وجدنا ايضاً احكاماً أخرى تتمثل فيها صورة الشخص الاعتبارى سوياً بكل مقوماته و خصائصه في النظر القانونى الحديث ـ
(المدخل الفقهى العام ج ٣ ص ٢٥٧)

"When we referred to the original texts and sources of the *Shari'ah*, we found in it legal provisions which in substance propound the concept of juristic person and its legal status. And, also, we found the legal provisions which personify the juristic person with all its principles and characteristics which are attributed to it by the latest (Western) law."

He, further, adds:

على ان هذا المعنى الحقوق فى الحديث للشخصية الحكمية انما يتجلى على اتم صورة و اكملها بنظرية التشريع الاسلامى فى بيت المال و في نظام الوقف و في الدولة التى يمثل فيها رئيسها صاحب السلطان جماعة الامة ـ (ص ٢٥٨)

"On the same pattern of the latest (Western) legal position of the juristic person, it is found in the *Shari'ah* in the most perfect form in the shape of the treasury, *waqf* and the state in which the head of the state personifies the entire Muslim community.

The following are the essential characteristics (ارکان) of juristic person :

(*i*) It can perpetuate its legal status independent of natural persons (الشخصيه الطبعيه).

(*ii*) It has legal rights (حقوق) and can own property.

(*iii*) It is responsible for legal obligations and has got borrowing powers.

All the three characteristics are exhibited in the *Shar* by state, treasury and *waqf*. There are some persons, howe who have held that *waqf* (*i.e.* Mosque)[1] is not a juristic pers

1. In the case of *Masjid Shahidganj*, the Lahore High Court (AIR Lah. 493) held that mosque is a juristic person. But the Privy Council dic agree to that, and held that suits cannot be brought by or against mos as artificial persons. (67 I.A. 251).

iis opinion has been strongly repelled by the renowned jurists
io have vehemently asserted that *waqf* is a juristic person.
ie former view is based on the confusion caused by a sentence
iich has occurred in some books of jurisprudence. It is:

ان الوقف لا ذمة له و انما تثبت ديونه في ذمه متوليه اولا
فتؤخذ من ماله او من تركته اذا توفى ثم يرجع هو ورثته
بها من مال الوقف

(تنقيح الحامديه ج ١ ص ٢٠٦)

"The *waqf* has no obligation for itself and its loans are primarily the responsibility of its trustee. These can be paid out of his property or estate if dead. Later on, the trustee or his legal heirs can get it out of the *waqf* property".[1]

From this it has been wrongly inferred that the obligations
: essentially attributed to the natural persons only. The true
:aning of the above reference is that the liability of *waqf* is
iited to its property. As such the loans should be satisfied,
itly, from the trustee who is supposed to be vigilant. He
ll then adjust his payments from the *waqf* property. There
io room for inference from this reference that *waqf* is not
ble for its debts. The above reference is followed by the
itence:

ثبوت الدين على الوقف رأساً بلا واسطه ذمة المتولى

"The proof of loan against the *waqf* stands without the intervention of the responsibility of the trustee."

The adherents to the repelled view get support from
other argument. They say that some of the Hanafi Jurists
ve held that a will of property cannot be made in favour of a
sque. From this they infer that mosque cannot own proper-
as such, it is not a juristic person.

1. *Tanqīh al-Hāmidiyā*, v. 1, p. 206.

The true position is that this view has been rejected by majority of the Hanafi Jurists. Muhammad Shaibānī is for validity of this will. Ibn 'Ābidīn Shāmī in *Radd al Muhtār* also emphasized the lawfulness of such a will. The majority is supported by the Shāfi'ī and Mālikī Jurists. 'Allāmā R says:

ان الوصية للمسجد صحيحة و ان اريد بها تمليكه لان المسجد
في منزلة شخص حر يملك

(نهاية المحتاج ج ٣ ص ١١٦ طبع حلبي مصر)

"The will in favour of a mosque is lawful although the intention is to make it owner of the property. Mosqu like a free natural person and can hold property."[1]

Although juristic persons have been recognized by Islamic Law, yet a juristic person cannot be innovated. white elephant of the Western Commercial Law—joint s companies—which is usually shown to be running into is unprecedented in the Islamic Law. In partnership, partners retain their separate legal personalities and are in dually held responsible for the entire enterprise. This cumbersome form of organization for large business chara ized by the concentration of economic power, and the fissio property rights.

Just as the factory system brought large number of wo under unified direction and control, so the corporate sy brought numerous bits of wealth together under a single r agement. The tremendous economic and social power of industrial and commercial corporations represents these features. It is difficult to realize what a basic change in organization of society is thereby effected !

If the corporation could be considered as a state, its citi would be shares of stock rather than persons. The shar stock is one of the great social inventions. The great aggre of concretely indivisible goods can be divided into small,

1. *Nihāyat al-Muḥtāj*, v. 3, p. 116.

form packages of rights to income and control, and easily transferable. This dispersion of ownership, definitely does not lead to a corresponding dispersion of direction and control of the corporation itself. On the contrary, the paradox is that the more widely stock ownership is diffused, the more likely it is that effective control of business wealth will be concentrated. Common stock rights to dividends do not necessarily mean any control over corporation policies. The investment ownership is widely diffused whereas the control ownership is highly concentrated. In the words of Wilbert E. Moore ;

> "The concentration of economic power is in fact chiefly made possible by dispersion of capital ownership."[1]

In spite of the dispersion of ownership indicated by the large number of shareholders, stock holdings are actually highly concentrated among and monopolised by a relatively few persons. The absolute control of large corporations is wielded by a few individuals or family groups who own a majority of the shares. Two main points emerge from the above discussion ;

(*a*) To a large degree, ownership of stock has been divorced from control over the specific uses to which capital resources are to be put and form power over business policy ;

(*b*) The dispersion of ownership is so far advanced that a further splintering of rights, occurs in the form of management control.

The nature of Corporate Property can be best put in the words of Berle and Means;

> "There has resulted the dissolution of the old atom of ownership into its component parts, control and beneficial ownership. This dissolution of the atom of property destroys the very foundation on which the

1. Moore ; *Industrial Relations and the Social Order* (N.Y. 1946), p. 76.

economic order of the past three centuries has rested."[1]

The law of *waqf* provides the dissolution of the property into control and beneficial ownership. But such a fission of property rights for the purpose of conducting business is not supported by any legal predecent (نظیر) or argument (دلیل) from the *Shari'ah*. The Statutory Corporotions for the public purposes, such as communications, electric supply etc. which do not envisage fission of the property rights, are, however, lawful; and which do envisage such a fission, are permitted by the Doctrine of *talfīque*.[2]

IV—INSURANCE

Insurance was, in fact started by the Muslims. It was known by the name of *Ḍhamāniyah* (ضمانیہ). When anarchy and dynastic rule corrupted the political institution of the Muslims, this business was captured by the Jews of the Balkan States. The Muslims advanced their footsteps ahead of Constantinople, and the Jews over there left the Southern Europe and went towards the North. It were these people who founded this business in England, which became famous, later on, by the name of Lloyds. The historians of Europe have unanimously acknowledged the fact that the Marine Insurance was started by the Muslims of Spain.

Ma'āqil (معاقل) is the interest free form of insurance which was prevalent during the period of the great Prophet (peace be upon him). In it the people having some common bond (same tribe, etc.) used to contribute. In case of legal liability like blood money and damages, on any of them, payment was made out of that fund. This institution existed among the pre-Islamic Arabs also. In the famous books of Islamic law like *Hidāyā*, there is found a complete chapter : on *Ma'āqil*.

1. A.A. Berle and G. C. Means : *The Modern Corporation and Privat Property* (N. Y. 1934), p. 8.

2. Ashraf 'Ali Thānwī: *Fatāwā Imdādiyā*, v. 3, p. 420.

The system of *ma'āqil* was practised by the Jews of Madina in an organiezd form. In the Charter of Madina, names of the tribes of Ansār have been enumerated and it has been said about them:

يتعاقلون معاقلهم الاولى[1] - (كتاب الاموال : ٣٠٢)

"They shall continue their previous institutions of *ma'āqil.*

Before the Prophet (peace be upon him), the system of *na'āqil* was practised among the members of one tribe. The Prophet (peace be upon him) declared all the *Muhājirīn* (refugees) of Madina as one social unit for the purposes of *ma'āqil.* Umar made the persons of the same department a unit for *na'āqil.* It is in the *Hidāyā*:

لو كان اليوم قوم تناصرهم بالحرف فعاقلتهم اهل الحرفة

"If today there are some people engaged in some profession, the professional colleages will constitute the brethren (عاقلہ) for the sake of *ma'āqil.*"[1]

V—PARTNERSHIP

In partnership (شرکت) a few individuals join together, for the purpose of doing business, with property (مال), skills (اعمال) or goodwill (وجاہت). The three kinds of partnerships are called *Shirkat al-amwāl*, *shirkat al-a'māl*, and *shirkat al-wujūh*, respectively.

In the above partnerships if the capital as well as the profit and loss are equally shared by the partners, it is *Shirkat al-mufawaḍhā* (شرکت المفاوضہ). And if the capital and the profit and loss are shared by the partners according to the settled terms, it is *Shirkat al-'Inān* (شرکت العنان).

All the partners, while conducting the business of the firm, shall be considered attorneys (وکیل), guarantors (کفیل) and

1. Ibn Humān : *Fath al-Qadīr*, v. 4, p. 177.

sureties (ضامن) of each other.

In case the *Shirkat al-'Inān* is dissolved the profit shall be distributed among the partners according to their shares in the capital; and if a partner had settled a condition of more profit that condition would be void.[1]

1. Ibn Nujaim, ; *Baḥr ar-Rāiq*, v. 5, p. 170.

15

Law of Evidence

I.—NATURE AND SCOPE OF PROCEDURAL LAW

Distinction should be drawn between procedural method and procedural techniques. The former comprises of the principles of procedure required for the implementation of substantive law; the latter are the measures which maintain the efficiency and effectiveness of the procedural principles. This distinction between method and technique has been recognized by the Logicians, and has been described by Goode and Hatt in *Methods in Social Research.* For instance, there is a hypothesis that the persons coming from broken homes (the families broken by death or divorce) become criminals. This hypothesis will become scientific if it is tested by scientific method. The empirical (practical) test is the principle underlaying a scientific method. This test can be undertaken by employing different techniques. One technique is that statistical data about the family background of the criminals are collected from jails. Another technique is a questionnaire prepared to find out the family background of a good number of persons known for their gentleness and conformity of behaviour. Out of the two, the technique which is more effective and efficient to test the validity of the hypo-

thesis will be applied. The hallmark of difference between method and technique, therefore, is that method is based on some principle of general import while technique is the efficiencymeasure and is strictly relative.

The Islamic System of Law provides substantive law and procedural methods. The procedural techniques are left to be worked out by the Muslims themselves. No system claiming to be universal and eternal would include the techniques within its scope. A technique is relative to a particular situation. It has to be kept substituted by the more efficient one. The skill behind a technique (*technicways*) emerges out of experience and experimentation. In Islam, *technicways* are called the worldly affairs (امور دنیا). The substantive law is termed as *Shari'ah* (شریعہ) and the procedural methods as *Minhāj* (منہاج) by the Qur'ān. Islam has prescribed the details of substantive law and procedural methods. The Qur'ān says :

لِكُلٍّ جَعَلْنَا مِنْكُمْ شِرْعَةً وَّ مِنْهَاجًا۔ (المائدہ : ۴۸)

"We have prescribed for each one of you the substantive law and the procedural methods." (Q. 5 : 48)

Shari'ah literally, means pathway leading to a water course, and *minhāj* is the manners observed while travelling on the pathway, for instance, one should keep to the left. Its technique should be the choice of the individuals whether they travel on foot, by some animal or an automobile. The Prophet (peace be upn him) calls techniques as the worldly affairs and says:

انتم اعلم بامور دنیا کم ۔ (مسلم)

"You (people) know better your worldly affairs (techniques)"

The principle of procedure (method) is that before deciding a case, both the parties should be given opportunity of being heard. This is the field of the techniques to lay down the ways and means to serve the process and summon the other party effectively. The techniques of serving the process have

to be different in a simple society than those in a highly populated society. It is a principle of the Constitutional Law that the persons in authority (اولی لامر) must be of representative character. The techniques of determining the representative character should be determined by the Muslims themselves. They are the best judges whether secret ballot, open voting, etc. suit their circumstances or not. The Qur'ān declares the principle of Evidence:

يَا أَيُّهَا الَّذِينَ آمَنُوا إِنْ جَاءَكُمْ فَاسِقٌ بِنَبَإٍ فَتَبَيَّنُوا۔ (الحجرات: ۶)

"O ye who believe, if a person of unrighteous character narrates a fact before you, ascertain the truth."
(Q. 49 : 6)

Ascertainment of the trustworthiness is the essential principle enunciated by the Qur'ān. In a much developed and complex society, the technique of ascertainment may be worked out by framing some rules of cross-examination.

The working out of the techniques cannot be arbitrary. It has to be for the sake of furtherance and effective implemetation of the procedural principles. This working out of the techniques come under the Mālikite doctrine of *Masāliḥ al-Mursalah*. This job must be carried out collectively or through the representatives of the people, to give the techniques, thus framed, the binding status. The binding status will be given by the doctrine of *Ijmā'* (اجماع).

II—LAW OF EVIDENCE

The object of the law of evidence is to lay down principles to prove the facts relevant for the decision of a case. The recognized methods of proof in the *Shari'ah* are : evidence and refusal to take oath. The evidence includes testimony, documentary evidence and admission. The 'Majella' says:

"The object of evidence is to prove what is contrary

to the apparent fact, the object of oath is to insure the continuance of the original state." (Art. 77).

In every dispute there are at least two litigant parties, the plaintiff and the defendant. The former claims what is contrary to the apparent fact and the latter denies the claim. The burden of proof lies on the plaintiff because what is apparent is presumed to be the original state. The theory that the apparent state will be presumed to be true, unless proved otherwise is called *Istishāb* (استصحاب).

The Islamic Law provides three ways of proving the facts before a court of law ;

1. Testimony (شہادت)

The number of witnesses depends upon the types of cases. The determination of truth depends upon the trustworthiness of witnesses and not upon their number.[1]

The testimony of two just men is necessary in all the penal matters with fixed punishment (hudūd), execpt in adultery which requires four.

Women's testimony.

In a system every item is related to the other, and its significance has to be understood in the context of that relationship. In Islam, woman is supposed to look after the household affairs and remain secluded from men and public life. Due to her seclusion from public life and lack of experience in public affairs, the testimony of two women is regarded equal to that of one man.

The Jewish Law does not accept women's testimony at all The Code Napoleon, before it was amended in the end of the 19th century, excluded the testimony of women.

There are spheres of life in which ladies are well versed. In those matters the testimony of women is equally good. These matters are, for instance, the fact of birth, female defects

1. Zaila'ī : *Tabyīn*, v. 4, p. 212.

ctation (رضاعت) etc.

ne man's testimony

All the recognized schools of law accept the testimony of ıe man in certain cases. Those cases are where the testimony : a woman alone is permissible, testimony of teacher in ıvenile delinquency, testimony of experts, defect in object of ıle, etc.[1]

Ibn Taimiyā says that the Qur'ān makes no mention of the :stimony of two males or one male and two famales, concerning ıe procedure (in civil matters) by which a judge arrives at his ıdgment, and that the Qur'ān merely mentions this procedure ı connection with a person's endeavour to safeguard his rights.[2]

dministration of oath

The majority of the jurists hold that there is no need of dministering oath because the word testimony (*Shahādah*) nplies an oath. Ibn Najaim and Ibn Qayyim are, however, of ıe view that the trustworthiness becomes doubtful when the ther party opposes the testimony. It should, therefore, be re-ıforced by oath.[3]

Trustworthiness (تزكيه الشهود)

Article 1716 of the 'Majella' says:

"For investigating the trustworthiness, of a witness, Abū Hanifā requires that the person against whom the testimony is made should have a chance to question the trustworthiness of such witness."

It is obligatory on the court to ascertain the trustworthiness ıf the witness. This may be done by way of cross-examination ıf the witness by the parties or the court.[4]

1. Ibn Nujaim : *Ashbah wan-Nazāir*, p. 112
2. Ibn Qayyim : *Al-Turuq al-Hukmiyah* p. 80.
3. *Ibid.*, p 125.
4. Al-Bābartī : *Sharh al-'Ināyā 'alā Fath al-Qadīr*, v. 6, p. 12.

Hearsay (شهادة على شهادة)

The normal rule is that hearsay is not admissible. Th ascertainment of its trustworthiness becomes impossible. The are, however, exceptions to this rule. For instance, Artic 1976 of the 'Majella' says:

> "Statements made by a number of persons may be accepted, where it would be contrary to reason to conclude that they had agreed to tell a lie."

The doctrine of *tawātur* (تواتر) sanctions such exception circumstances.

Circumstantial evidence

The conclusive presumptions are the circumstantial ev dence. These presumptions are discussed under the headi of *Istishāb* (استصحاب). These are based on circumstantial fac public usages, etc. Another presumption of this kind is t presumption of paternity which is attributed to the husband.

Written evidence

It is in tha Qur'ān:

يَاأَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَىٰ أَجَلٍ مُسَمًّى فَاكْتُبُوهُ ـ (البقرة: ٢٨٢)

> "O ye who believe ! when ye contract a debt for a fixed term, record it in writing." (Q. 2: 286)

The jurists are, however, of the view that written eviden is merely recommended and no obligatory.[1]

It is not a primary method of proof. It is mentioned connection with admission by writing while giving testimony ascertain its authenticity. Admission in writing is the same oral admission.

2. Admission (الاقرار)

The Qur'ānic verse spells out the admissibility of adm sion.

1. Fakhr ad-Dīn Rāzī : *Commentary on the Qur'ān.*

يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ وَلَوْ عَلَىٰ أَنْفُسِكُمْ ـ

(النساء : ١٣٥)

"O ye who believe ! be ye staunch in justice, witness for God, even though it be against yourself."

(Q. 4 : 135)

A person is not allowed to retract his admission if it pertains to the rights of the others. In the cases of the crimes of fixed punishment (حدود) a person cannot be punished on the basis of retracted confession.[1]

Admission binds the person who makes it. Admission on behalf of other person is not admissible in evidence.

Oath

Oath is acceptable in the matters involving civil rights. It is not admissible in criminal cases. It is a weak method of proof which does not terminate a dispute. If trustworthy evidence is on one side and oath on the other, the latter will be rejected.

If oath is tendered to the defendant, he may take it, refuse to do so, or retort the same to the plaintiff. Refusal to take oath amounts to admission. Such refusal is, however, in itself a weak method of proof. It should be corroborated by the oath of the plaintiff whether arising from the defendant's request or not.[2]

Article 1363 of the French Civil Code also considers oath as decisive factor in the administration of justice.

1. Suyūtī : *Al-Ashbah*, p. 67.
2. Ibn Qudāmah, *Al-Mughnī*, v. 12, p. 124.

16

Guide For The Lawyers

In the previous chapters it has been discussed what the law . It is also important to know where the law is, which jurists nd books are authoritative and to what extent.

inds of Jurists

The Jurists are of three kinds,

(*a*) *Absolute and Independent Jurist* (مجتهد مطلق مستقل):

He is also called jurist in the *Shari'ah* (مجتهد فی الشرع) He is not follower (مقلد) of any jurist. He is himself competent to derive rulings (مسائل) from the sources: the Qur'ān, the *Sunnah, Ijma'* and *Qiyas.* For instace, Abū Hanīfa, Mālik, Shāfi'ī and Ahmed bin Hanbal are the jurists of this kind.

(*b*) *Absolute but Related Jurist* (مجتهد مطلق منتسب)

He is competent to do *ijtihād* and does not follow any other jurist in arguments (دلائل) as well as rulings (مسائل). But he follows the style (طرز اجتهاد) of a particular jurist. For instance, Abū Yusuf, Muhammad Shaibānī and Zufar who follow the style of Abū Hanifā, Nawawī, Ibn Ṣalah, Ibn Daqīq al-'Īd, Taqī al-Dīn Subkī, etc. are the jurists of this kind.

(*c*) *Qualified Jurist or Jurist in School* (مجتهد فی المذهب)
He follows some particular independent jurist. H knows, in detail, the school of his leader jurist (امام his established principles and the arguments of h rulings. He should be capable to derive the rulin from the original sources according to the style of h Imām, in the matters wherein no rulings are narrate from his Imām. For instance, Khassāf, Abū Bal Jassās Rāzī, Tahāwī, Shams al-Āimmā Sarakhsī, Ab al-Hasan Karkhī, Hākim Shahīd, etc. belong to th category.

Sha'rānī in *Al-Mīzān* has quoted Suyūtī that absolute an independent *Ijtihad* has not been claimed by anybody oth than the four Imāms of Jurisprudence (ائمہ اربعہ) *i.e.* Abū Hanif Mālik, Shāfi'ī and Ibn Hanbal. Ibn Jarīr Tabarī also clain ed to be an unqualified and Independent jurist but he did n succeed, nor the scholars acknowledged him in that capacit It is wrong to assume that further unqualified and independe *ijtihad* is impossible. It is, however, a different thing that it h practically not taken place.

Strata of Jurists (طبقات الفقہاء)

Ibn Kamāl Bāshā Rūmī has enumerated seven strata of th Hanafī jurists.

1. *Jurists in the Shari'ah* (مجتہدین فی الشرع). They are n followers of any jurist, and independently deduce pri ciples (اصول) and details (فروع) from the four sourc (ادلہ اربعہ). Abū Hanifā, Mālik, Shāfi'ī and Ahmad bi Hanbal belong to this stratum.

2. *Jurists in the School* (مجتہدین فی المذہب). They are comp tent to derive legal provisions from the four sourc according to the principles of Jurisprudence establishe by Abū Hanifā. They follow Abū Hanifā in princ ples although they have differed with him in son

detailed rulings. the pupils of Abū Hanifā: Abū Yusuf, Muhammad Shaibānī, Zufar, etc. belong to this stratum.

3. *Jurists in the Rulings* (مجتہدین فی المسائل). The jurists of this stratum are competent to derive rulings concerning the problems wherein no ruling is narrated from their Imām. They follow the rules and regulations of Jurisprudence established by their Imām. Khaṣṣāf, Ṭahāwī, Abū al-Hasan Karkhī, Hulwānī, Sarakhsī, Bazdawī, Qāḍhī Khan, ete. belong to this stratum.
4. *The People of Derivation* (اصحاب تخریج). They are not competent to do *ijtihad*, but have such a mastery over the principles and details of their schools that they can expand the summarized and explain the ambiguous rulings narrated from Imām of the school and his companions. They are technically the followers (مقلدین) and not *Mujtahid* (مجتہدین). Jaṣṣāṣ Rāzi belongs to this stratum.
5. *The People of Preference* (اصحاب ترجیح). In case more than one rulings are available on a certain problem, they can analyse the arguments on which they are based; and, thus, give preference to the one which is based on comparatively sounder arguments. Abū al-Hussain Qudūrī and the author of *Hidāyā* belong to this stratum. They are also technically the followers (مقلدین).
6. Those who are competent to classify the rulings chronologically as well as according to the strength and authenticity thereof. The authors of the four texts (متون اربعہ) *i.e. Kanz* (کنز), *Mukhtār* (مختار), *Wiqāyā* (وقایہ) and *Majma'* (مجمع) belong to this stratum.
7. Those who are merely the compilers.

Critical Appreciation

Ibn Kamāl Bāshā's stratification of Jurists, calls for criticism. He has lowered the rank of Jaṣṣāṣ Rāzī whose status as

jurist is higher than Sarakhsī, etc. Hulwānī has said abou Jassās that he follows him and takes his view (قول) as authorita tive. Abū Bakr Jassās Rāzī's student Abū Ja'far Astroshnī i the teacher of Qaḍhī Hussain Nasafi who is futher teacher c Shams al-Āimmā Hulwānī, the teacher (استاذ) of Shamsal Āimmā Sarakhsī, and Sarakhsī is the teacher of Qaḍhī Khan.

Ibn Kamāl Bāshā has, also, enumerated Qudūrī an Burhān al-Dīn the author of *Hidāyā*, in the category of th people of preference (اصحاب ترجیح); and Qaḍhī Khan in th stratum of the *mujtahidin* (مجتہدین). Whereas Qudūri's status i learning is higher than Shams al-Āimmā, what to talk of Qaḍh Khan. Of course, Qaḍhī Khan belongs to the stratum of th People of Preference. He should have been included in the fift stratum, and Quḍūrī and the author of *Hidāyā* should have bee included in the third stratum of *mujtahidīn*. Ibn 'Ābidīn Shām has discussed this matter in *Radd al-Muhtār*.

Strata of Rulings (طبقات مسائل)

The legal rulings of the Hanafites have got three strat according to their strength (قوت) and weakness (ضعف).

1. *Basic Rulings* (مسائل اصول) *or Manifest Narration* (ظاہر الروایت).

   The rulings which are narrated from Abū Hanifā an his pupils: Abū Yusuf, Muhammad Shaibānī, Zufa Hasan bin Ziyād, etc, in the Six Books (کتب ستہ) Muhammad Shaibānī *i.e. Mabsūt, Jāmi' Saghīr, Jām Kabīr, Siyar Kabīr, Siyar Saghīr* and *Ziyādāt*.

   Hākim Shahīd compiled these six books in th form of one book and named it *Kāfī* (کافی). He omitte therein the repetitions of Muhammad Shaibān Shams al-Āimmā Sarakhsī wrote a commentary c *Kāfī*, which is called *Al-Mabsūt* (المبسوط).

   The books of Karkhī, Tahāwī and Qudūrī als contain the rulings of this category.

2. *Rare Ruliugs* (مسائل نوادر)

These are the rulings narrated from the three imāms (ائمہ ثلاثہ): Abū Hanifā, Abū Yusuf and Muhammad Shaibānī, but are not contained in the six books of Muhammad Shaibānī. These are found in the other books of Muhammad Shaibānī like *Kīsāniyāt* (کیسانیات), dialogues (امالی) of Abū Yusuf. etc.

3. *Juristic Decisions* (فتاوی)

These are called Events (واقعات) also. These are the rulings concerning the matters in which no ruling from Abū Hanifā or his Companions is available. Abū Hanifā and his Companions are called the Earlier Jurists (متقدمین); and the students of the Companions of Abū Hanifā and further their students are called the Later Jurists (متاخرین). The *Fatāwā* are the rulings of Later Jurists in the matters not covered by the rulings of Earlier Jurists. These are the lowest in status and strength. These are called *Fatāwā* because these were stated in answer to questions.

Fatāwā Bazzāziyā by Kardarī, *Fatāwā Sirājiy*i by Sirāj al-Din Awshī, *Fatāwā Qaḍhī Khan* by Sultān al-Shari'ah Hasan bin Mansūr Qaḍhī Khan, *Fatāwā 'Ālamgīrī, Fatāwā Radd al-Muḥtār* by Ibn 'Ābidīn Shāmī, etc. are the important digests of decisions. *Radd-al-Muhtār* is the commentary on *Durr al-Mukhtār* which is again commentary on *Tanwīr al-Abṣār*.

Earlier and Later Jurists

The Earlier (متقدمین) Jurists are those jurists who were the contemporaries of Abū Hanifā and *Sāḥibain* (صاحبین), and benefited from them. The jurists who did not have the opportunity of learning directly from Abū Hanifā, Abū Yusuf and Muhammad Saibānī, are the Later (متاخرین) Jurists.

The People of Derivation (اصحاب تخریج)

Karkhī; Abū Bakr Jaṣṣāṣ Rāzī, the student of Karkhī; Abū

'Abdullah Jurjānī, the student of Jaṣṣāṣ Rāzī; Abū al-Hussain Qudūri, the student of Abū Abdullah Jurjāni, etc. are the People of Derivation. Qudūrī is included in the people of Derivation as well as the People of Preference.

The People of Preference (اصحاب ترجیح)

Qāḍhī Khan; Asbījābi; Qudūrī, Burhān al-Dīn Marghīnāni the author of Hidāyā; Ibn al-Humām; Ibn Kamāl Bāshā; Abi al-Sa'ūd 'Imādi, etc. are the People of Preference. Qāḍhi Khan and Ibn al-Humām are counted among the People of Derivation also. The student of Ibn al-Humām, Qasim bin Qatlobaghā says that the authentication (تصحیح) of Qāḍhi Khan has got preference over the others. Shāmī holds that Ibn al-Humām is considered by some of his contemporaries as the *mujtahid fil masāil.*

The Text Books (متون)

The books with two characteristics are called the text books;

(1) Only the authentic rulings of the category of the Manifest Narration (ظاهر الروایت) are included.

(2) The authors have renowned status as jurists.

The Earlier Jurists call the short books (مختصرات) of Taḥāwī, Karkhī, Jaṣṣāṣ, Khaṣṣāf, Hākim, etc. as the Text Books.

The Later Jurists consider *wiqāyā*, *Mukhtaṣar Qudūrī* and *Kanz al-Daqāiq* (متون ثلثہ) as the Text Books. Some Later Jurists count *Mukhtār* and *Majma' al-Bahrain*, also.

The text books of the Later Jurists are comparatively lower in rank due to the admixture of explanatory views therein.

As far as the force of argument is concerned, the text books (متون) have preference over the commentaries (شروح) thereon, and the commentaries have got preference over the *Fatāwā* (فتاوی).

Wiqāyā (وقایہ) is a selection from *Hidāyā*, written by Tāj al-Shari'ah Mahmūd for his grandson Sadr al-Shari'ah 'Ubaid Allah bin Mas'ūd who, later on, wrote a commentary thereon namely *Sharḥ wiqāyā* (شرح وقایہ). The portions of *Sharh Wiqāyā*

concerned with Marriage, Dower and Divorce are considered to be better than their corresponding portions in *Hidāyā*.

Mukhtasar Qudūrī (مختصر قدوری) was written by the great jurist Abū al-Hussain Qudūrī. Khatīb Baghdādī had learnt *Hadīth* from him. The famous book *Hidāyā* (هدایہ) is, in fact, commentary on *Mukhtasar* of Qudūrī and *Jami' Saghir* of Muhammad Shaibānī. The author of *Hidāyā* follows the arrangement (ترتیب) of *Jami' Saghīr* wherein Muhammad Shaibānī has narrated rulings from Abū Hanifā through the chain of Abū Yusuf. In *Jami' Kabīr* Muhammad Shaibāni has narrated ruling directly from Abū Hanifā. Whenever the author of *Hidāyā* uses the word *al-kitāb* (الکتاب) he refers to *mukhtasar Qudūrī*. *Fath al-Qadīr* (فتح القدیر) is the famous commentary on *Hidāyā* by Ibn al-Humām.

Kanz al-Daqāiq (کنز الدقائق) was written by Abū al-Barkāt 'Abdullah bin Ahmad bin Mas'ūd Nasafī. He had learnt Jurisprudence from Shams al-Āimma Kardarī who was the student of the author of *Hidāyā*. *Baḥr al-Rāiq* is the famous commentary on *Kanz al-Daqāiq* by Ibn Nujaim (ابن نجیم).

Resolution of Conflict (دفع التعارض)

In the case of conflict between text books and commentaries, the text books shall be preferred, and in the case of conflict between commentaries on text books and *Fatāwā*, the commentaries shall be given preference. This is called Implied Authentication (تصحیح التزامی). The authors of the Text Books undertook to collect the authentic rulings out of Manifest Narration (ظاهر الروایت), whereas the authors of the Commentaries and the *Fatāwā*, generally, did not abide by the condition of authenticity. This state of affairs is presumed where there is no Clear Authentication (تصحیح صریح). The Clear Authentication shall have preference over the Implied Authentication. If a ruling of *Fatāwā* is clearly authenticated and that of Text Book has not been clearly authenticated, the former shall be given preference over the latter in the case of conflict between the two.

Terminology of the Jurists

The jurists commonly use the words *Shaikhain* (شیخین) *Sāhibain* (صاحبین) and *Tarafain* (طرفین). The authors of *Siyar* (سیر) call Abū Bakr and 'Umar as *Shaikhain* and *Sāhibain.* The Traditionists (محدثین) call Bukhāri and Muslim as *Shaikhain* In the terminology of the Jurists (فقہا) Abū Hanifā and Abū Yusuf are called *shaikhain* as both of them were the teacher (شیخ) of Muhammad Shaibānī. Abū Yusuf and Muhammad Shaibānī are *Sāhibain* as both were companions of Abū Hanifā Abū Hanifā and Mohammad Shaibānī are called *Tarafain.*

Abū Hanifā is called Imām A'zam (امام اعظم), Abū Yusu is called Imām Thānī (امام ثانی) and Mohammad Shaibānī i called Imām Rabbānī (امام ربانی). All the three are called Āimmā Thalāthā (ائمہ ثلاثہ). Abū Hanifā, Mālik, Shāfi'ī and Ahmed bin Hanbal are called Āimmā Arb'ā (ائمہ اربعہ).

Simple Shams al-Āimmā (شمس الائمہ) means Shams al-Āimmā Sarakhsī. In the case of the others it will necessarily be followed by their names. For instance, Shams al-Āimmā Hulwānī Shams al-Aimma Kardari, Shams al-Aimma Ozjandi, etc.

Unreliable Books

The following is the list of the unreliable books. Against each book the name of the author and the name of the jurist who declared that to be unreliable have been mentioned.

	Book (کتاب)	*Author* (مصنف)	*Prohibitory* (مانع
1.	*Quniyā* (قنیہ)	Najm al-Din Mukhtār bin Mahmūd Zahidī Mu'tazilī	Taḥtāwī
2.	*Hāwī* (حاوی)	Ibid	Ibn 'Abidī Shāmi
3.	*Jami' al-Ramūz* (جامع الرموز)	Shams al-Dīn Mohammad Qahastānī	'Uṣām al-D
4.	*Al-Sirāj al-Wahāj* (السراج الوهاج)	Abū Bakr bin 'Alī Hadādī	Barkalī

5.	*Kanz al-'Ubād* (كنز العباد)	'Alī bin Ahmad Ghaurī	Mullā 'Ali Qāri
6.	*Maṭālib-al-Mu'minīn* (مطالب المؤمنين)	Badr al-Din Tāj Lahorī	Shāmī
7.	*Mushtamil al-Ahkīm* (مشتمل الاحكام)	Fakhr al-Din Rūmi	Barkalī
8.	*Khazānat al-Riwāyāt* (خزانة الروايات)	Qaḍhī Jahan Hanafī	Shāmī
9.	*Al-Fatawa al-Sūfiyā* (الفتاوى الصوفيه)	Faḍhl-Allah Muhammad bin Ayūb	Ibn Kamāl Bāshā
10.	*Khulasat al-Kaidanī* (خلاصة الكيداني)	Lutf-Allah Nasafī	'Abd al-Haiyy Lukhnawī
11.	*Fatāwā Ibn Nujaim* (فتاوى ابن نجيم)	Zain al-'Ābidīn Miṣrī	Shāmī
12.	*Sharh Kanz* (شرح كنز)	Mullā Miskīn	Shāmī
13.	*Sharh Mukhtaṣar Wiqāyā*	Abū al-Makārim	Shāmī

Works of Other Schools

(*a*) *Mālikī School*

1. *Muwatta'* (مؤطا)

   This book has been wtitten by Mālik himself.

2. *Al-Mudawwana* (المدونة).

   This book comprises of the Decisions (فتاوى) of Mālik narrated by Sahnūn (سحنون) through the chains of the students of Mālik.

(*b*) *Shafi'ī School*

Kitāb al-Umm is the famous book of Shāfi'ī on the Islamic Law and Jurisprudence.

(*c*) *Hanbalī School*

1. *Al-Musnad*

   This is a famous book of *Hadīth* compiled by Ahmed bin Hanbal

2. *Al-Mughnī*

   This is a voluminous commentary by Mawaffaq bin Qudāmā al-Maqdisī on *Al-Mukhtasar* of Al-kharqī. Al-Kharqī, in his *Al-Mukhtasar*, has compiled rulings narrated from Ibn Hanbal by Khallāl.

Ja'farī School

1. *Kitāb al-Kafī* by Muhammad bin Ya'qūb Al-Kulīnī.
2. *Man Lā Yahzuruh al-Faqīh* by Ibn Babwaih Al-Qummī.
3. *Tahdhīb al-Ahkām* by Muhammad bin Hasan Al-Tūsī.
4. *Al-Istibsar* by Abū Ja'far Muhammad bin Hasan Al-Tūsī.

Works on Jurisprudence (اصول فقہ)

The first comrehensive work on Jurisprudence is *Al-Risālā* by Shāfi'ī. The later works on Jurisprudence had two styles: philosophical (متکلمانہ) and juristic (فقیہانہ). Four remarkable books were written in the philosophical style; *Kitāb al-Burhān* (کتاب البرھان) by Imām al-Haramain, *Al-Mustaṣfā* (المستصفی) by Al-Ghazzālī, *Kitāb al-'Ahd* (کتاب العہد) by Abd al-Jabbār Mu'tazilī, and commentary on *Kitāb al 'Ahd* by 'Abū al-Hussain Baṣrī Mu'tazilī. In the philosophical style the emphasis is on the logical reasoning to substantiate the principles of Jurisprudence, whereas in the juristic style the emphasis is on the illustrations from the juristic rulings and the classification of juristic

precedents (نظائر) to elaborate the principles of Jurisprudence.

Fakhr al-Dīn Rāzī in *Al Maḥsūl* and Āmidī in *Al-Ihkām*, extracted the material from the above-mentioned four books and elaborated in their own styles. The main trend of Fakhr al-Dīn Rāzī was philosophic while the trend of Amidī was mainly juristic. Sirāj-al-Dīn Ārmawī summarized Fakhr al-Dīn Rāzī's, *Al-Mahsūl* in his book *Al-Tahsīl*, and Taj al-Dīn Ārmawī summarized that in *Al-Hāṣil*. Shahāb al-Dīn Qarāfī collected the premises and maxims from *Al-Tahsīl* and *Al-Hāsil*, and wrote *Tanqīhāt*. Similarly Baiḍhāwī wrote *Minhāj*. Ibn Hājib wrote the extract of Amidī's *Al-Ihkām* in his *Mukhtasar Kabīr* and then summarized that in his *Mukhtasar Saghīr*.

The Hanafite jurists wrote books on Jurisprudence in the juristic style. Out of the Earlier Jurists Dabbūsī wrote *Al-Asrār*. From among the Later Jurists Fakhr al-Islam Bazawī's *Al-usūl* (الاصول) and 'Abdullah bin Ahmad Nasafī's *Al-Manār* (المنار) are the most remarkable books. Ibn Sā'ātī kept in view Bazdawī's *Usūl* and Amidī's *Ihkām*, and wrote *Al-Badī'* (البديع) which is in the philosophical as well as juristic style. Ibn al-Humām clarified and explained the subject matter of *Al-Badī'* in his book *Al-Tahrīr* (التحرير). He made some additions and added some personal researches also.

Sadr al-Shari'ah 'Ubaid-Allah bin Mas'ud Bukhārī wrote an extract of Fakhr al Islām Bazdawī's *Usūl* and named that *Tanqih al-usūl*. He then wrote a commentary on *Tanqīh al-usūl* under the name of *Taudhih* (توضيح) in which he added certain discussions from Fakhr al-Dīn Razī's *Mahsūl* and Ibn Hājib's *Mukhtasar*. Taftāzānī wrote *Talwīḥ* which is also a commentary on *Tanqih al-usūl*.

Muhibb-Allah Bihārī's *Musallim al-Thabūt* (مسلم الثبوت) is based on Ibn al-Humām's *Tahrīr*, Ibn Hajib's *Mukhtaṣar* and Baiḍhāwīs' *Minhāj*, certain additions have also been made. Tāj al-Dīn's Subkī's *Jam'al-Jāwami'* (جمع الجوامع) is also a remarkable book. Ibn al-Qayyim's *I'lām al-Muwaqqi'īn* (اعلام الموقعين) and Shāṭib's *Al-Muwāfaqāt* (الموافقات) are the encyclo-

paedic digests of jurisprudential principles. *Al-Muwāfaqi* also explains the objects of law (مقاصد الشرع) and the underlyin wisdom lying therein, in the most remarkable manner.

APPENDIX I

DETAILED SYLLABUS OF ISLAMIC LAW AND JURISPRUDENCE II

Prescribed for LL.B. Classes by the Punjab University ; being Comparative study with particular reference to the Islamic Laws suspended by the British Rule in the Sub-continent.

PART I—JURISPRUDENCE

1. **Defination of Law**

Comparison between God-given and man-made Laws—Definition of Jurisprudence—Islamic Jurisprudence is more scientific than Western Jurisprudence.

Books Recommended

(1) مقدمة التشريع الجنائی : عبدالقادر عوده ۔

(2) Methods in Social Research—by Goode and Hatt—Chapter V.

2. **Sources of Law**

A. Sources of Islamic Law, British Law, and the Law actually in practice in Pakistan—Significance of basing the entire legal system on Divine Revelation.

Books Recommended

(1) العقل و النقل : ابن تیمیه ۔

(2) The Reconstruction of Religious Thought in Islam by Mohammad Iqbal—Chapter V.

B. Brief history of compilation of the Holy Qur'ān—Legislative functions of the Qur'ān—Criticism of the view of the Orientalists that the Qur'ān has no juristic potentials.

Books Recommended

(1) تدوین قرآن : مناظر احسن گیلانی ۔

(2) Shāfi'ī's Risālā.

C. Brief history of compilation of the *Sunnah*—Significanc of making the *Sunnah* as the second basic source—Legislative functions of the *Sunnah*—The *Sunnah* an the Orientalists.

Books Recommended

(۱) السنة (اردو) : مصطفیٰ السباعی ۔

(۲) فی التشریع النبوی ؐ : محمود بابلی ایڈوکیٹ بیروت ۔

(3) A Study of Man—by Ralph Linton—Chapter VII.

(4) *The Snnnah*—by S. M. Yusuf.

D. The Philosophy of Ijmā' and its role in the changin society—Its parallel concept in the Western Society.

E. *Qiyās* : Analysis of the phenomenon of social change—Factors which necessitate changes in law—Structur and function of the concept of *Qiyās*—Criticism of th Orientalists.

F. *Istihsān* : Juristic significance of *Istihsan*—Meaning rigidity and flexibility—Criticism of the view of th Orientalists that the first Caliphs had to violate th Qur'ān and the *Sunnah*—Comparison with the Wester concept of Equity.

G. *Custom* : Conditions for the validity of Custom—Custom and the Orientalists.

Books Recommended

(1) Islamic Law: Its Scope and Equity—by Dr. Sa Ramdhan.

(2) The Early Development of Islamic Jurisprudence by Dr. Ahmed Hasan.

(3) A Handbook of Sociology—by Osburn and Nimko Part VII.

(۴) المدخل الفقہی العام : مصطفیٰ زرقا ۔

(۵) ضوابط المصلحة فی الشریعة الاسلامیہ : ڈاکٹر سعید رمضان ۔

(٦) القياس الشرعی : ابن تیمیه -
(٧) ابوحنیفه : ابو زهره ـ فصل ٢١ تا ٣٣ -
(٨) اعلام الموقعین : ابن قیم جلد ٣ -
(٩) الموافقات : شاطبی جلد ٣ -
(١٠) نظرة عامه فی تاریخ الفقه الاسلامی : ڈاکٹر علی حسن عبدالقا

Roman Law—a Comparison

Salient distinctive features of Islamic Law and Roman Law Is Islamic Law indebted to Roman law?

oks Recommended

(١) An Introduction of Roman Law—by Hunter.
(٢) امام اعظم : شبلی نعمانی ٢٨٨ تا ٢٩٥ -
(٣) فلسفه شریعت اسلام : صبحی محمصانی باب چہارم ، فصل پنج

PART II—LAW

Constitutional Law

Theories of sovereignty : Islamic and Western—Influence Islam on Locke's and Rousseau's theories of sovereignty—mocracy and Islamic system of 'Shūrā'—Independence of liciary—Scope of Legislation—Fundamental Rights—Brief mments on the Constitutions of 1956 & 1962 & 1973.

oks Recommended

(١) Religion and Politics in Pakistan—by Leonard Binder.
(٢) کتاب الخراج : ابو یوسف -
(٣) اسلام کا نظام حکومت : مولانا حامد الانصاری غازی -
(٤) اسلام کا سیاسی نظام : مولانا اسحاق سندیلوی -
(٥) منهاج الاسلام فی الحکم : محمد اسد -
(٦) النظام السیاسی فی الاسلام : ڈاکٹر عبدالکریم عثمان -
(٧) احکام السلطانیه : ماوردی -
(٨) سیرت النبیﷺ : شبلی نعمانی خطبه حجة الوداع -

2. International Law

Muslims : the first authors of 'International Law'—Conce of Nationhood (قومیت) in Islam—Two-Nation theory—Islam Law of War, Treaties and Neutrality—Prisoners of War ai Slavery (استرقاق)—Comparison between Islamic 'Istirqāq' ai Roman Slavery—Islamic Law and the U.N. Charter.

Books Recommended

(1) The Islamic Law of Nations (Translation of Shaibāni *Kitāb al-Siyar* (کتاب السیر).

(2) The Muslim Conduct of State—by Dr. Hamid Ullah.

(۳) شرح السیر الکبیر : امام سرخسی ۔

(۴) احکام اهل الذمه : ابن قیم جوزیة ۔

3. Law of Crimes

Theories of Criminality : Islamic and Western—Five Ur virsals—Relationship of Culture and Crime—Classification crime—General Exceptions: (ارتفاع المسؤلیة و العقوبة)—Comm intention (الاشتراک)—Abetment (التسبب)—Attemt (الشروع).

Books Recommended

(1) Law of Homicide in Islam by J.N.D. Anderson.

(2) Criminology—by Caven.

(۳) التشریع الجنائی : عبد القادر عوده ۔

(۴) العقوبة و الجریمة : ابو زهره ۔

(۵) حجة الله البالغه : شاه ولی الله حصه دوم باب الحدود ۔

4. Law of Torts and Contracts

A. *Torts* (جنایت)—Sources of civil obligations—Kinds legal dispositions (التصرفات الشرعیه)—Torts and dispo tions of commissions (التصرفات الفعلیه) —Exercise of rig —Unauthorised dealing in the property of other 'Faḍhūli (فضولی)—Unlawful enrichment—Transgressi or forbidden acts—Wrongful appropriation or destru tion of property.

B. *Contracts* (عقود)—Verbal dispositions (التصرفات القوليه)—Unilateral (Wakf, Bequest) and Bilateral (contracts)—Formation of contract—Impediments to consent—Object of contract—Types of special contracts (sale, hire, loan. deposit, guarantee, pledge, agency, arbitration, partnership)—The concept of 'juristic person'—Transfer of obligations—Negotiable Instrument and 'Hawālah' (حوالہ).

ıoks Recommended

(1) Partnership and Profit in Medieval Islam—by A. L Udovitch.

(2) Insurance in Islamic Law—by Dr. Muslihud-Din Chapter VII.

(۳) الفقه الاسلامی فی ثوبه الجدید : مصطفیٰ زرقا ۔

(۴) النظریة العامه للموجبات و العقود : صبحی محمصانی ۔

(۵) حجة الله البالغه : شاه ولی الله ابواب البیع ۔

(۶) شرکت و مضاربت کے شرعی اصول : ڈاکٹر نجات الله صدیقی

(7) The Majella.

5. Law of Evidence

Salient features of Islamic Law of Evidence—Comparative ıdy with the British Law.

oks Recommended

(1) The State and the Individual in Islamic Law—N. J Coulson.

(۲) فلسفه شریعت اسلام : صبحی محمصانی ص ۳۷۱—۴۳۰ ۔

(۳) منهاج الطالبین : امام نوری ۔

(۴) مجلة الاحکام العدلیه ۔

(۵) رد المحتار جلد ۵ کتاب الشهادت ۔

(۶) معین الحکام ۔

ɔ. *The Reconstruction of Legal Thought in Islam* by Syed Riaz ul Hasan Gilani covers the entire syllabus.

APPENDIX II

SUMMARY OF CHAPTER 6

ılamic Law and Social Change

To understand the relationship of a legal system with the ɔcial change it is necessary to explain the nature and scope of ıe latter. A precise grasp of the changes undergoing in a society ɔquires the fixation of the primary unit of social system, as atom in Physics and molecule is in Chemistry.

Meaningful social action is the unit of a social system. A ɔcial action may be meaningless also as, for instance, a sitting erson goes on shaking his leg aimlessly. Social action is that ct or omission of an individnal which affects the state of body r mind of the other. Day dreaming or soliloqui is not a social ction for the reason that by it the state of body or mind of ıe others is not effected.

Three elements constitute the structure of social action.

(*i*) The idea which motivates the performance of social action.

(*ii*) Corpus or body of social action.

(*iii*) *Technicways*: material (tools) and non-material (devices) techniques used for the performance of social action.

For instance, in the social action of murder, the idea is to ill somebody, the act of killing is the corpus of social action nd knife or pistol used for killing is the *technicways*.

The nature and scope of social change is such that the ɔcond element always remains constant irrespective of the hanges of time and place. The first and the third elements go n changing, but this change observes a universal principle. 'here is the relationship of Master and Servant or Principal nd Agent between the first and the third elements. The first lement is the Principal and the third one is the Agent.

From a lawyer's viewpoint, shift and substitution in the omain of *technicways* is irrelevant. A murder is a murder

whether it is committed with the help of knife or gun. Th Pakistan Penal Code was drafted in the end of the nin teenth century when the significant scientific inventions such railways, wireless, television, etc. were not yet introduced in th Sub-continent. But the introduction of all these inventions h not necessitated any change in any of the definitions includes i the Penal Code. Science is concerned with the efficiency *teehnicways* and the advancement of scientific knowledge immaterial while considering the relationship of law with soci change. The more efficient *technicways* go on substituting th less efficient ones without attracting a jurist's mind.

It is only the first element which is significant for o purpose. Change in basic ideas and beliefs renders change in th legal nature of social action. Ideas differ with time and plac andthe legal systems, therefore, must differ accordingly. If society is inhabited by the people who are of the view that the is no harm if two adults share sexual enjoyment, adultery w not be an offence therein. But the society which attach great importance to chastity, is very allergic to adultery a provides serious punishment for that.

The sum and substance of the above discussion is that is only the ideas and belief system which change and therel cause change in the legal system. A Muslim is not supposed change his belief system (عقايد). A true Muslim will, rathe harness the circumstances according to his beliefs and convi tions. By making every element of the belief system obligato and immune from change, the legal system of Islam maintai its universal and enternal character.

The Islamic system does not approve the division of ide into old and modern as the basis of being reasonable and othe wise. Everything old is not bad and everything new is n necessarily good. An old item may be more pure and valuab than the new one. The ideas should only be divided as reaso able and unreasonable, and not as old and new or Eastern a Western.

The legal systems devised by human beings must undergo ange. Human mind is never perfect and its thoughtful con- butions also do carry the symptoms of unreasonableness which e discoverable by the like human beings with the passage of ne and shift in places. The change in such system has got stification. The human mind must proceed towards complete rgation of superfluities and the Golden Mean. But the lamic System being revealed by God the Omniscient is devoid all such defects and is already on the Golden Mean. A ange introduced into it will only disturb its balance.

A system is rigid if it is unreasonable and/or incomprehen- /e, and still insists on sticking to it and resists diffusion or novation. There is no other characteristic which may render system to be rigid. It has already been stated that unreason- bleness cannot be attributed to the Islamic System. It is so mprehensive also that for the last thirteen hundred years, body has been able to point out a social situation, whether actical or fictitious (تقدیری), on which the Qur'ān and the *nnah* are silent.

Lastly, it is a universally recognized principle of legislation at a change can be introduced in a legal provision by the dy which has authority to lay down that provision. The aw laid down by God Almighty can be repealed, amended, bstituted or suspended by Him alone. The human beings are mply supposed to obey that.

APPENDIX III

SUMMARY OF CHAPTER 11

The Qur'ān and the *Sunnah* throw light on every aspect of the International Law of Islam. There are many verses of the Qur'ān which deal with the subject of International law. It is miracle of the Qur'ān that its one verse has got the potential to lay down almost all the aspects of the International Law of Islam. The verse runs as follows:

قَدْ كَانَتْ لَكُمْ أُسْوَةٌ حَسَنَةٌ فِي إِبْرَاهِيمَ وَالَّذِينَ مَعَهُ إِذْ قَالُوا لِقَوْمِهِمْ إِنَّا بُرَآءُ مِنْكُمْ وَمِمَّا تَعْبُدُونَ مِنْ دُونِ اللَّهِ كَفَرْنَا بِكُمْ وَبَدَا بَيْنَنَا وَبَيْنَكُمُ الْعَدَاوَةُ وَالْبَغْضَاءُ أَبَدًا حَتَّىٰ تُؤْمِنُوا بِاللَّهِ وَحْدَهُ ۔ (الممتحنه: ۴)

"There is for you an excellent example (to follow) in Abraham and those with him; when they said to their people: we are an entity separate from you and from those whom ye obey besides Allah. We deny your lawful status, and there has arisen between us and you, enmity and hatred for ever, unless you believe in Allah and him alone." (Q. 60: 4)

The following, among others, points of the law of Nations has been stressed in this verse:

1. The prophet Abraham (peace be upon him) is the founding father of the behaviour which has been made examplary for the Muslims.

2. Abraham (peace be upon him) and his companions, collectively, made a declaration before the people with whom they shared common language, race, territory, custom and unlawful sovereignty, that they are a separate different entity from the unlawful sovereigns and their subjects. The Qur'ān uses the word *Qaum* for the people who have a common bond of language, race, territory or customs and are organised under some unlawful sovereignty. The lawful sovereignty is

that of God Almighty. The rest are all unlawful sovereignties.

3. The declaration of being a separate entity is the proclamation of *two-nation theory*. The people who believe and practice the exclusive sovereignty of God are a different nation (قوم) from all those who patronize the other sovereignties irrespective of the fact that they speak the same language, belong to the same race and live in the same territory. As such Abraham (peace be upon him) is the father of *two-nation theory*.

4. After declaring themselves to be a separate entity, they deny to accord lawful status to the unlawful sovereignties. The Islamic Law, therefore, does not give *de jure* recognition to the sovereignties of un-Islamic states. *De facto* recognition for a limited period is, however, permitted. *De facto* recognition for unlimited period amounts to *de jure* recognition. Entering into treaties with non-Muslim states amounts to *de facto* recognition. All the treaties entered into by the Prophet of Islam (peace be upon him) with the other states were for specifically stipulated period.

5. Then, a declaration of perpetual enmity and hatred (state of war) between the two nations is made. Refusal to accord *de jure* recognition is not sufficient. The surface of earth has to be cleared of the unlawful sovereignties, and the exclusive sovereignty of God has to be established thereon. The organization of unlawful sovereignties mean the establishment of state within a State of God, which cannot be tolerated by the Divine Police-men (Muslim). The enmity (state of war) may be dormant as well as open. The rebels of God can be tolerated only with a heavy heart although there exists a treaty with them.

6. Lastly, a way has been proposed to end the state of perpetual enmity. That is possible if the non-Mnslims surrender their sovereignties before the exclusive sovereignty of God, and this is the only way. The object of the Muslims is not self-aggrandisement or purge of the existence of the

non-Muslims. It is rather the establishment of one state of God on the entire surface of earth, wherein the exclusive sovereignty of God is perpetuated; and thereby the rule of human beings over their like human beings is completely eliminated. The right to rule the creatures vests only in the Creator.

7. God being the only lawful Sovereign, the *de jure* territorial jurisdiction of the Islamic State extends throughout the world. The *de facto* Geographical boundaries of the Islamic State are not permanent. It is, therefore, axiomatic that division of Islamic wars into offensive and defensive is wrong and misleading.

8. The lawful status of the territories which are not under the *de facto* jurisdiction of the Islamic State is denied by the Islamic Law. The violation of the law over there is no offence. Unless the lawful government is established, the law cannot take cognization of the offences. Such act is, however, a sin in the eyes of God.

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